No. 95-809

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

LOCKHEED CORPORATION, et al.,
Petitioners,
vs.
PAUL L. SPINK,
Respondent.

On Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

GORDON E. KRISCHER
(Counsel of Record)
DAVID E. GORDON
KENNETH E. JOHNSON
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, CA 90071-2899
(213) 669-6000
Attorneys for Petitioners Lockheed Corporation, et al.

THERESA M. TRABER
(Counsel of Record)
BERT VOORHEES
TRABER, VOORHEES & OLGUIN
128 N. Fair Oaks Avenue
Suite 204
Pasadena, CA 91103
(818) 585-9611
Attorneys for Respondents Paul L. Spink, et al.

Petition for Certiorari Filed November 24, 1995
Certiorari Granted January 19, 1996

TABLE OF CONTENTS

		Page
Relevant Docket Entries From Courts Below		1
Complaint		4
Nature Of The Action		5
Jurisdiction And Venue		6
Facts Common To All Causes Of Action		6
Class Action Allegations		12
Count I:	Violation Of ERISA's Prohibition Of Age Discrimination	14
Count II:	Violation Of Age Discrimination In Employment Act	18
Count III:	Breach Of Fiduciary Duty Under ERISA	20
Count IV:	ERISA -- Failure To Follow Terms Of Plan	24
Count V:	Promissory Estoppel	26
Prayer For Relief		27
Defendants' Notice Of Motion And Motion To Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6)		30
Lockheed's Response To Plaintiff's First Set Of Requests For Admissions Propounded To Defendant Lockheed Corporation (Excerpt From Exhibit B To Gordon E. Krischer's Declaration In Support Of Defendants' Motion To Dismiss)		32
Letter From Tellep To Spink (Exhibit A To Lockheed's Response To Plaintiff's First Set Of Requests For Admissions)		34
Declaration Of Robert G. Kropf In Support Of Defendants' Motion To Dismiss		37

Relevant Provisions Of The Lockheed Retirement Plan For Certain Salaried Employees, As Amended December 17, 1990 (Excerpts From Exhibit A To Declaration Of Robert G. Kropf) 39

Section 1.01: Administrator Of The Plan 39
Section 1.10: Credited Service 39
Section 1.11: Employee 39
Section 1.14: Hour Of Service 39
Section 1.16: Member 41
Section 1.20: Plan Year 41
Section 1.27: Week Of Service 41
Section 1.29: Year Of Service 41
Section 2.01: Commencement of Membership 41
Section 4.01: General 42
Section 4.04: Future Service For Benefit Calculation Purposes 42
Section 5.01: Normal Retirement 44
Section 5.02: Early Retirement 44
Section 13.01: Named Fiduciary 45
Section 13.02: Responsibilities Of Named Fiduciaries 46
Section 13.03: Allocation of Responsibilities . . . 48
Section 14.01: Amendment Of Plan 48
Section 15.02: 1990 Special Retirement Program 49
Section 15.03: 1990 Voluntary Retirement Program 53

Relevant Provisions Of The Lockheed Retirement Plan For Certain Salaried Employees In Effect As Of May 17, 1979 (Excerpts From Exhibit B To Declaration Of Robert G. Kropf) 58

Section 1.16: Member 58
Section 2.01: Commencement of Membership 58

Lockheed Corporation Board Of Directors' Certified Copy Of Resolutions Adopting The 1990 Special Retirement Opportunity (Excerpts From Exhibit C To Declaration Of Robert G. Kropf) 59

District Court Opinion And Order 62

Respondent's Notice Of Appeal To The United States Court of Appeals For the Ninth Circuit . . . 73

Ninth Circuit Opinion And Order 76

Ninth Circuit Order Denying Petition For Rehearing 95

RELEVANT DOCKET ENTRIES FROM COURTS BELOW*

District Court Docket Entries
Spink v. Lockheed Corp., et al.,
Case No. CV 92-0800 SVW (GHKx)

Date	Description
2/5/92	Complaint filed and summons issued; Demand for Jury Trial
4/2/92	Defendants filed Notice of Motion and Motion to Dismiss Complaint
4/2/92	Declaration of Gordon E. Krischer in Support of Motion to Dismiss
4/2/92	Declaration of Robert G. Kropf in Support of Motion to Dismiss
4/27/92	Motion to Dismiss argued; Court issued minute order taking Motion to Dismiss under submission
7/31/92	Court issued order granting defendants' Motion to Dismiss plaintiff's Complaint in its entirety and dismissed plaintiff's Complaint with prejudice for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6). Judgment entered on 7/31/92
8/27/92	Plaintiff filed Notice of Appeal to the Ninth Circuit Court of Appeals from the District Court's order entered 7/31/92. Fees paid.

---

* For the Court's convenience, the docket entries set forth below have been revised and reworded by the parties to more accurately and clearly reflect the actual entries contained in the dockets of the District Court for the Central District of California and of the United States Court of Appeals for the Ninth Circuit.

Ninth Circuit Docket Entries
Spink v. Lockheed Corp., et al.,
Docket No. 92-56094

Date	Description
9/9/92	Docketed cause and entered appearances of counsel
2/8/93	Filed Motion of International Union of Petroleum and Industrial Workers for Leave to file amicus brief along with its amicus brief
2/19/93	Filed Motion of American Association of Retired Persons (AARP) for Leave to file amicus brief
2/22/93	Received AARP amicus brief
4/1/93	Received letter dated 3/31/93, from Gordon E. Krischer, Esq., counsel for appellees, and Bert Voorhees, Esq., counsel for appellant re: The undersigned parties' consent to the filing with the U.S. Court of Appeals of a brief by each of the following amicus curiae, pursuant to FRAP 29: (1) The American Assoc. of Retired Persons; (2) The International Union of Petroleum and Industrial Workers; and (3) The ERISA Industry Committee
4/1/93	Received amicus brief of ERISA Industry Committee
4/26/93	Filed certified record on appeal in one volume (total); 0 Clerks record; 1 RT
10/18/93	Filed certificate of record on appeal. RT filed in District Court on 12/18/92

Date	Description
1/12/94	Filed supplement to certified record on appeal (filed 4/26/93) in two volumes; 2 Clerk's record; 0 RT
2/1/94	Argued and submitted to Dorothy W. Nelson, Stephen R. Reinhardt, Melvin Brunetti
7/18/95	Filed Opinion: Reversed in part; affirmed in part (Spink's request for attorneys' fees is granted). Dorothy W. Nelson; Stephen R. Reinhardt; Melvin Brunetti, author. Filed and entered judgment
8/1/95	Filed original and 40 copies of Appellees Lockheed Corp., et al. petition for rehearing with suggestion for rehearing en banc, 15 pages (panel & all active judges); served on 7/31/95
9/1/95	Filed order (Dorothy W. Nelson, Stephen R. Reinhardt, Melvin Brunetti): The petition for rehearing is denied and the suggestion for rehearing en banc is rejected
11/30/95	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 95-809; filed on 11/24/95

Theresa M. Traber
Bert Voorhees
LAW OFFICE OF TRABER & VOORHEES
3550 Wilshire Boulevard, Suite 1408
Los Angeles, California 90010
Telephone: (213) 382-7271

Attorneys for Plaintiff
Paul L. Spink

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL L. SPINK, individually and on behalf of a class of similarly-situated individuals, Plaintiff, vs. LOCKHEED CORPORATION, a Delaware corporation; DANIEL M. TELLEP; ROBERT A. FUHRMAN; VINCENT N. MARAFINO; K.H. ANDERSON; L.J. BARNARD; R.W. BERRY; P.N. BRAUNAGEL; D.L. BRONCO; R.H. NORTHCUTT; W.E. SKOWRONSKI; A.G. VAN SHAICK; W.T. VINCENT, and DOES 1 THROUGH 50, Defendants.	Case No. 92-800 SVW (GHKx) COMPLAINT FOR DAMAGES AND DECLARATORY AND INJUNCTIVE RELIEF [CLASS ACTION] DEMAND FOR JURY TRIAL

NATURE OF THE ACTION

1. This is a class action brought by PAUL L. SPINK (hereafter "Spink" or "plaintiff") against LOCKHEED CORPORATION and various divisions, departments, affiliates and/or subsidiaries thereof, including but not limited to LOCKHEED AERONAUTICAL SYSTEMS COMPANY, LOCKHEED CALIFORNIA COMPANY, and/or LOCKHEED ADVANCED DEVELOPMENT PROJECTS (hereinafter collectively referred to as "Lockheed"), and related defendants, pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, *et seq.*, and the Age Discrimination In Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq.*

2. Spink brings claims under ERISA for himself and on behalf of similarly situated persons to enforce the terms of Lockheed's pension plan, to redress violations of the provisions of ERISA, and to remedy breaches of fiduciary duty by the plan administrators. Under ERISA, Spink alleges that defendants have violated and continue to violate ERISA by denying full pension benefits to him and a class of similarly situated persons because of their age, and by breaching their fiduciary duties to Spink and the plaintiff class by using millions of dollars of pension plan funds to obtain a release of various employment related claims of employees against the plan sponsor concurrently with the massive layoff of the plan sponsor's employees, all to the benefit of Lockheed, not the Plan.

3. Spink brings claims under the ADEA for himself and on behalf of similarly situated persons to obtain monetary, declaratory and injunctive relief to redress defendants' failure to provide full pension benefits to him and class members because of their age.

4. For himself alone, Spink also asserts a common law claim for promissory estoppel and an individual ERISA claim alleging that Lockheed breached the terms of the pension plan and, thus, ERISA by failing to consider all his years of service with Lockheed to determine his eligibility to participate in and the amount of his benefits under the pension plan.

JURISDICTION AND VENUE

5. Plaintiff invokes the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1331, 1337, and 29 U.S.C. §§ 626, 1132. This is an action arising under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq.* Declaratory relief is sought under 28 U.S.C. §§ 2201(a) and 2202. This Court has pendent jurisdiction over Spink's state claims because they arise out of the same nucleus of common facts on which Spink's ERISA and ADEA claims are based.

6. Venue is proper under 29 U.S.C. § 626 and § 1132 because the violations of ERISA and the unlawful employment practices alleged in this complaint took place in this judicial district and/or the defendants reside and/or do business in this judicial district.

FACTS COMMON TO ALL CAUSES OF ACTION

7. Plaintiff has served or will serve copies of the original complaint on the Secretary of Labor and the Secretary of the Treasury as required by 29 U.S.C. § 1132(h).

8. Plaintiff Paul L. Spink ("Spink") was, during periods of time from in or about 1939 through June 30, 1990, an employee of various divisions, departments, affiliates, and/or subsidiaries of defendant Lockheed Corporation. Plaintiff is a participant in the Lockheed Retirement Plan For Certain Salaried

Employees ("Plan"), within the meaning of Section 3(7) of ERISA, 29 U.S.C. § 1002(7), and is currently receiving benefits from the Plan.

9. Defendant Lockheed Corporation is a Delaware corporation doing business as an aerospace manufacturer in the State of California and throughout the United States, under its own name and under the name of its various divisions, departments, affiliates and/or subsidiaries, including but not limited to LOCKHEED AERONAUTICAL SYSTEMS COMPANY, LOCKHEED CALIFORNIA COMPANY, and/or LOCKHEED ADVANCED DEVELOPMENT PROJECTS (hereinafter collectively referred to as "Lockheed"). Lockheed is an "employer" engaged in commerce and is the Plan Sponsor, as that term is used in ERISA, and is an "employer" within the meaning of and subject to the provisions of the ADEA. As the Plan Sponsor, Lockheed was responsible for the appointment and retention of individuals to the Retirement Plan committee to administer the Plan, among other things. In addition, Defendant Lockheed was responsible at all material times for interpreting and implementing the terms of the Plan, including ensuring the Plan complied with all applicable federal and state laws. Defendant Lockheed had actual control of Plan assets. Therefore, Defendant Lockheed was at all material times a "fiduciary" within the meaning of Section 3(21) (A) of ERISA, 29 U.S.C. § 1002 (21) (A). Defendant Lockheed is also a "party in interest" within the meaning of Section 3(14) of ERISA, 29 U.S.C. § 1002(14).

10. Defendant Daniel M. Tellep ("Tellep") was at all material times Chairperson of the Board and Chief Executive Officer of Defendant Lockheed. Tellep was at all material times a "fiduciary" and a "party in interest" within the meaning of ERISA §§ 3(14) and (21) (A), 29 U.S.C. §§ 1002(14) and 1002(21) (A) with respect to the Plan.

11. Defendant Robert A. Fuhrman ("Fuhrman") was at all material times through April 1, 1990, Vice Chairperson of the Board and Chief Operating Officer of Defendant Lockheed. Fuhrman was at all material times through April 1, 1990, a "fiduciary" and a "party in interest" within the meaning of ERISA §§ 3(14) and (21) (A), 29 U.S.C. §§ 1002(14)and 1002 (21) (A) with respect to the Plan.

12. Defendant Vincent N. Marafino ("Marafino") was at all material times Chairperson of the Board and Chief Financial and Administrative Officer of Defendant Lockheed. Marafino was at all material times a "fiduciary" and a "party in interest" within the meaning of ERISA §§ 3(14) and (21) (A), 29 U.S.C. §§ 1002(14) and 1002 (21) (A) with respect to the Plan.

13. Defendant K. H. Anderson ("Anderson") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Anderson was at all material times a "fiduciary" within the meaning of ERISA § 3(21) (A), 29 U.S.C. § 1002 (21) (A) with respect to the Plan.

14. Defendant L. J. Barnard ("Barnard") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Barnard was at all material times a "fiduciary" within the meaning of ERISA § 3(21) (A), 29 U.S.C. § 1002 (21) (A) with respect to the Plan.

15. Defendant R. W. Berry ("Berry") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. R. W. Berry was at all material times a "fiduciary" within the meaning of ERISA § 3(21) (A), 29 U.S.C. § 1002 (21) (A) with respect to the Plan.

16. Defendant P. N. Braunagel ("Braunagel") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Braunagel was at all material times a "fiduciary" within the meaning of ERISA § 3(21) (A), 29 U.S.C. § 1002 (21) (A) with respect to the Plan.

17. Defendant D. L. Bronco ("Bronco") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Bronco was at all material times a "fiduciary" within the meaning of ERISA § 3(21) (A), 29 U.S.C. § 1002 (21) (A) with respect to the Plan.

18. Defendant R. H. Northcutt ("Northcutt") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Northcutt was at all material times a "fiduciary" within the meaning of ERISA § 3(21) (A), 29 U.S.C. § 1002(21) (A) with respect to the Plan.

19. Defendant W. E. Skowronski ("Skowronski") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Skowronski was at all material times a "fiduciary" within the meaning of ERISA § 3(21) (A), 29 U.S.C. § 1002 (21) (A) with respect to the Plan.

20. Defendant A. G. Van Shaick ("Van Shaick") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Van Shaick was at all material times a "fiduciary" within the meaning of ERISA § 3(21) (A), 29 U.S.C. § 1002 (21) (A) with respect to the Plan.

21. Defendant W. T. Vincent ("Vincent") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Vincent was at all material times a "fiduciary" within the meaning of ERISA § 3(21) (A), 29 U.S.C. § 1002 (21) (A) with respect to the Plan.

22. At all material times, Bankers Trust Company ("Bankers") was the Trustee and Custodian of the assets of the Plan. Bankers holds the assets of the Plan and performs as trustee pursuant to the Plan's Trust Agreement.

23. Spink is ignorant of the true names and capacities of defendants sued as DOES 1 through 50, inclusive, and therefore sues said defendants by such fictitious names. Spink will ask leave of court to amend this complaint to allege their true names and capacities when the same shall have been ascertained. Spink alleges that each of the defendants named as DOES herein was in some manner responsible for the acts and omissions alleged herein, and he will ask leave of this court to amend this complaint to allege such responsibility when the same shall have peen ascertained.

24. The Plan, which has been in effect for many years, was restated effective August 5, 1985, and has been amended from time to time. The Plan is a defined benefit non-contributory plan that covers substantially all salaried employees of the participating companies, which include Defendant Lockheed Corporation, its departments, divisions, affiliates and subsidiaries. Employees who are eligible to participate in the Plan receive benefits upon their retirement, death, or disability in accordance with the terms of the Plan. Upon information and belief, during the relevant period the Plan had in excess of $1 billion surplus of assets above those needed for funding requirements under the Plan.

25. According to the Plan's terms, the Plan is governed by federal law, the Trust Agreement and the Plan document itself.

The Plan is administered by the Retirement Plan Committee ("Committee"), which Committee has the responsibility and legal authority to control the Plan's operation and administration in accordance with the terms of the Plan Document and Trust Agreement, including the exercise of all fiduciary functions provided for in either the Plan Document or the Trust Agreement as are necessary to the Plan's administration and operation. By resolution of its Board of Directors, the plan sponsor, Defendant Lockheed had authority to appoint and/or approve the Committee's membership.

26. The Plan Document and the Trust Agreement for the Plan expressly provide that the Plan's assets shall not be used for or diverted to any other purposes than for the sole and exclusive benefit of Plan participants and beneficiaries.

27. Spink was first employed by Lockheed as a timekeeper and then as a welder from approximately November, 1939, through August, 1941. Spink worked for Lockheed Overseas Corporation from approximately July, 1943 through July, 1944, for Navy Lockheed Service Center from approximately July, 1944 through August, 1945, for Lockheed Aircraft Corporation from approximately August, 1945 through November, 1945, and for Lockheed Aircraft Service, Inc. from approximately November, 1945 through November, 1946. From approximately August, 1947 through August, 1950, Spink was again employed by Lockheed Aircraft Service, Inc. Spink worked for Lockheed California Company beginning in or about May, 1979 through the mid-1980's, and from that time until his retirement on or about June 30, 1990, he was employed by Lockheed Aeronautical Systems Company and/or Lockheed Advanced Development Projects.

CLASS ACTION ALLEGATIONS

28. Spink brings Counts I, II and III pursuant to Rule 23(b) (2) and (3) of the Federal Rules of Civil Procedure on behalf of himself and other persons similarly situated.

29. Under Counts I and II, Spink seeks to represent a class of all persons who:

(a) have had or will have at least one hour of service for Lockheed in any plan year beginning in 1988 or thereafter, and

(b) have been or will be participants or eligible to be participants in the Plan in any plan year beginning in 1988 or thereafter, and

(c) have had or will have their benefits under the Plan calculated under a formula which disregards, because of their attainment of any age, any time of service with Lockheed.

30. Under Count III, Spink seeks to represent a class of all persons who were injured by defendants' breach of their fiduciary duties to the Plan as alleged herein and whose injuries resulted from their waiver of certain rights in order to obtain enhanced benefits under the Special Retirement Opportunity ("SRO") and/or the 1990 Voluntary Retirement Program ("VRP") which were provided in or about May, 1990, or from their loss of such benefits because they refused to waive their rights.

31. Joinder of the numerous members of these classes would be impracticable since, on information and belief, it is alleged that the size of each class is in excess of 30 persons.

32. The claims brought on behalf of these classes depend on the resolution of common questions of fact and law

affecting all members of the class, including whether defendants have taken the actions alleged and whether the practices, policies and actions alleged herein violate ERISA and the ADEA.

33. Spink's claims are typical of those of the members of the classes he seeks to represent. Spink will fairly and adequately represent the interests of the proposed classes because his claims are identical to those of the members of the classes and because he has secured representation by attorneys who are skilled and knowledgeable in the prosecution of complex employment litigation.

34. Defendants' unlawful actions and/or refusals to act as defendants alleged in this complaint have been taken on grounds generally applicable to all members of the alleged classes, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to each class as a whole. Further, the questions of law and/or fact common to the members of each class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversies alleged, since the statutory violations alleged and the conduct giving rise to those violations are identical for all class members. The only individual issue which is truly of an individual nature is the question of monetary relief to which each class member is entitled. Since such relief will necessarily be calculated by reference to a common formula imposed by the Court upon resolution of the statutory claims.

COUNT I
VIOLATION OF ERISA'S PROHIBITION OF AGE DISCRIMINATION
29 U.S.C. § 1054(a) (1) and (b) (1) (H) (i)
(Class claim)

35. Spink restates and realleges and incorporates by this reference Paragraphs 1 through 34, inclusive, as though fully set forth herein.

36. Spink brings this claim on his own behalf and on behalf of a class of similarly situated persons under Section 502(a) (1) (B) and (3) of ERISA, 29 U.S.C. §§ 1132(a) (l) (B) and (3).

37. Spink is informed and believes and, on that basis, alleges that, at or about the time that Spink returned to Lockheed, the terms of the Plan provided that all salaried employees of Lockheed were considered participants or members of the Plan, unless they were 60 years old or older when they first began working for Lockheed.

38. At the time he returned to Lockheed in May, 1979, Spink was 61 years old, his birthdate being October 31, 1917. In or about 1984, Lockheed informed Spink that he would not be considered a participant or member of the Plan because he was over age 60 when he was rehired by Lockheed in 1979.

39. In 1986, the U.S. Congress enacted the Omnibus Budget Reconciliation Act of 1986, P.L. 99-509 ("OBRA 1986"), which, *inter alia*, amended ERISA to bar discrimination on the basis of age in the participation and benefit accrual standards applied by employee benefit plans, including but not limited to the Plan for Lockheed employees. As a result, Section 202(a)(2) of ERISA provides, "No pension plan may exclude from participation (on the basis of age) employees who have attained a specified age." 29 U.S.C. § 1052 (a) (2).

40. OBRA 1986 also amended Section 204 of ERISA, "Benefit accrual requirements," the relevant part of which currently provides:

> a. **Satisfaction of requirements by pension plans** Each pension plan . . .
>
> (1) in the case of a defined benefit plan, shall satisfy the requirements of section (b)(1) of this section; . . .
>
> b. **Enumeration of plan requirements**
>
> * * *
>
> (1)(H)(i) Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.

29 U.S.C. § 1054(a)(1) and (b)(1)(H)(i).

41. Pursuant to OBRA 1986, the Internal Revenue Service ("IRS") published proposed regulations interpreting and applying the above language concerning the proper calculation of benefits under an ERISA retirement benefit plan to the effect that, for a participant who has at least one hour of service for a plan sponsor in plan years beginning in 1988 or thereafter, a defined benefit plan may not disregard any years of service, *including years of service before 1988*, in determining the participant's plan benefit. Federal Register on April 11, 1988 (53 F.R. 11867). After interagency coordination and consideration of the comments received during their respective comment periods, both the IRS and the Equal Employment Opportunity Commission ("EEOC") noticed their intention to publish final regulations to the above effect, with

respect to the relevant sections of both ERISA and the ADEA. The IRS issued this position in Notice 88-126 (December 9, 1988) which was then published in the Internal Revenue Bulletin on December 27, 1988. 1988-52 I.R.B. The EEOC issued its notice to the same effect at 29 C.F.R. Part 1625, 54 F.R. 604 (January 9, 1989).

42. Under Section 9204 (a) (1) of OBRA 1986, the new benefit accrual provisions "shall apply only with respect to plan years beginning on or after January 1, 1988, and only to employees who have 1 hour of service in any plan year to which such amendments apply."

43. Plaintiff Spink worked more than one hour for Lockheed in the plan year beginning subsequent to January 1, 1988 as well as in later plan years. At some point, Spink was informed by defendants that they did not intend to credit him with accrued benefits based on his years of service for Lockheed prior to January, 1989.

44. When Spink was so informed, he challenged defendants' position in a number of ways including, but not limited to, by writing a letter, dated June 7, 1990, to defendant Tellep, in Tellep's capacity as Board Chair and Chief Executive Officer of defendant Lockheed, citing, *inter alia*, all of Spink's prior years of service for Lockheed, and directing Tellep's attention to the IRS and EEOC regulations set forth above. Spink also mailed copies of this letter to the other members of Lockheed's Board of Directors.

45. Notwithstanding the clarity of both the IRS and EEOC regulations interpreting the ADEA and ERISA amendments brought about by OBRA 1986, defendant Tellep responded to Spink's letter on behalf of Lockheed, informing Spink that Lockheed would not give Spink or other similarly situated employees who had not been Plan participants prior to the so-called

"effective date" of December 25, 1988, credit for service prior to January, 1989, actually going so far as to state that Lockheed would not give such employees "retirement service credit for periods before an employee became a participant in the plan, *even if participation was previously excluded on account of age.*" (emphasis added). On information and belief, Spink alleges that defendant Tellep sent copies of his letter, dated June 20, 1990, to the other members of Lockheed's Board of Directors.

46. Defendants' policy or practice of denying full accrued benefits to Spink as more fully set forth in Paragraphs 43 through 45, above, constitutes a violation of Sections 202 (a) (2) and 204 (a)(1) and (b)(1)(H)(i) of ERISA, 29 U.S.C. §§ 1052(a) (2) and 1054 (a)(1) and (b)(1)(H)(i). Upon information and belief, Spink asserts that defendants have consistently maintained and applied and will continue to maintain and apply this policy or practice to deny accrued benefits not only to Spink but other similarly situated persons all in violation of Sections 202 and 204 of ERISA as set forth more fully above.

47. As a direct and proximate result of defendants' conduct as alleged herein, Spink and those persons similarly situated have lost and will continue to lose Plan benefits to which they are entitled, and have lost and will continue to lose opportunities for additional benefits, including but not limited to the opportunities represented by the Special Retirement Opportunity ("SRO") and the 1990 Voluntary Retirement Program ("VRP") which were provided in or about May, 1990. Unless and until this court enjoins defendants' discriminatory conduct as alleged herein, said conduct will continue to cause irreparable injury to Spink and to the plaintiff class, who have no adequate remedy at law. Further, relief by damages alone for defendants' continuing discriminatory practices would require a multiplicity of suits.

COUNT II
VIOLATION OF AGE DISCRIMINATION IN EMPLOYMENT ACT
29 U.S.C. SECTION 623
(Class claim)

48. Spink restates and realleges and incorporates by this reference Paragraphs 1 through 34, and Paragraphs 37 through 45, all inclusive, as though fully set forth herein.

49. OBRA 1986 amended the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621, *et seq.*, to bar discrimination on the basis of age in the participation and benefit accrual standards applied by employee benefit plans, including but not limited to the Plan for Lockheed employees. Section 4(j)(1)(A) of the ADEA, 29 U.S.C. § 623(j)(1)(A), now provides that it is unlawful for an employer

> to establish or maintain an employee pension benefit plan which requires or permits--
>
> (A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age.

50. Lockheed's policy or practice of denying full accrued benefits to Spink as more fully set forth above, constitutes a violation of Section 4(j) (1) (A) of the ADEA, 29 U.S.C. § 623(j)(l)(A). Upon information and belief, Spink asserts that Lockheed has consistently maintained and applied and will continue to maintain and apply this policy or practice to deny accrued benefits not only to Spink but other similarly situated persons all in violation of Section 4 of the ADEA.

51. As a direct and proximate result of Lockheed's unlawful conduct as alleged herein, Spink and those persons

similarly situated have lost and will continue to lose Plan benefits to which they are entitled, and have lost and will continue to lose opportunities for additional benefits, including but not limited to the opportunities represented by the Special Retirement Opportunity ("SRO") and the 1990 Voluntary Retirement Program ("VRP") which were provided in or about May, 1990. Spink and members of the class he represents are entitled under Section 7(b) of the ADEA, 29 U.S.C. § 626(b), to be made whole for all losses flowing from Lockheed's discriminatory conduct.

52. On or about February 6, 1990, Spink filed a charge of discrimination with the EEOC. On or about March 29, 1991, the EEOC issued a determination finding that the evidence obtained during the investigation established that Lockheed had violated Spink's right under the ADEA, because OBRA 1986 "provides that no year of service (including years of service before 1988) may be disregarded because of age in determining a participant's benefit under a defined benefit [plan] for plan years beginning after 1987." The Letter of Determination also invited Lockheed and Spink to enter into conciliation efforts and notified the parties that the statute of limitations for bringing a lawsuit would be tolled beginning on March 29, 1991, for a period of up to one year for conciliation.

53. In the face of the proposed final regulations promulgated by the IRS and the EEOC and the March 29, 1991 Determination of the EEOC -- all of which clearly demonstrate that Lockheed's policy and/or practice of denying full accrued benefits to Spink and similarly situated individuals violates the ADEA -- Lockheed has failed and refused to alter its unlawful policy or practice and has also failed and refused to provide Spink and similarly situated individuals with the full benefits to which they are entitled. Because Lockheed has known and now knows that its policy or practice violates the ADEA and/or has shown a reckless disregard for the matter of whether its policy or practice violates the ADEA, Lockheed's conduct as alleged herein is willful within

the meaning of Section 7(b) of the ADEA, 29 U.S.C. § 626(b). Thus, in addition to the losses alleged in Paragraph 51, above, Spink and each member of the class is entitled to receive liquidated damages in an amount equal to his or her losses resulting from the discrimination.

54. Unless and until this court enjoins defendants' discriminatory conduct as alleged herein, said conduct will continue to cause irreparable injury to Spink and to the plaintiff class, who have no adequate remedy at law. Further, relief by damages alone for defendants' continuing discriminatory practices would require a multiplicity of suits.

COUNT III
BREACH OF FIDUCIARY DUTY UNDER ERISA SECTION 404 AND 406 OF ERISA, 29 U.S.C. §§ 1104 AND 1106
(Class Claim)

55. Spink restates and realleges and incorporates by this reference Paragraphs 1 through 34, inclusive, as though fully set forth herein.

56. Spink brings this claim on his own behalf and on behalf of a class of similarly situated persons under Section 502(a)(2) and (3), 29 U.S.C. §§ 1132(a) (2) and (3).

57. In 1989 and early 1990, Lockheed's management engaged in a contest for control of the corporation with Harold Simmons and NL Industries, Inc. ("Simmons/NLI"), which resulted ultimately in both Lockheed and Simmons/NLI spending hundreds of millions of dollar in a takeover battle and an attendant proxy fight. During this struggle for the corporate control of Lockheed, among other misconduct, Lockheed management and Plan fiduciaries manipulated various Plan assets for their own benefit and for the benefit of Lockheed in violation of their duties under the Plan Document, Trust Agreement and ERISA not to use

or divert Plan assets for any purpose other than for the sole and exclusive benefit of Plan participants and their beneficiaries. Such actions were taken with the knowledge and consent of defendant Lockheed in violation of its duties as Plan Sponsor to see that Plan assets are used solely in the interests of Plan participants and their beneficiaries.

58. After a lengthy and heated battle and in response to continued fears of takeover efforts by Simmons/NLI, defendant Lockheed undertook a major reorganization at its Board of Directors meeting on or about May 8, 1990, allegedly in an effort to make its aeronautical systems business more competitive and profitable by streamlining its operations. One portion of this streamlining involved consolidating the company's Southern California operations in Georgia, which move involved nearly total elimination of defendant Lockheed's Burbank facilities over the next several years. At the time of the May Board meeting, defendant Lockheed estimated that close to 3000 employees, most of whom were then located at the Burbank facility, would be laid off by late June, 1990.

59. In order to carry out these plans, defendant Lockheed passed Plan amendments at the May 8 Board of Directors meeting, which amendments provided for a Special Retirement Opportunity ("SRO") and a 1990 Voluntary Retirement Program ("VRP"). These options were then made available to certain groups of individuals until June 30, 1990. To be eligible, a Lockheed employee had to hold a salaried position within one of the relevant groups and be on the active payroll or on leave between May 8 and June 30, 1990.

60. The SRO and VRP options offered eligible employees incentives in the form of increased benefits upon retirement to take certain specified employment-related actions. Except for certain identified individuals whose continued employment was deemed important in meeting defendant

Lockheed's operational requirements, virtually all persons eligible for normal or early retirement under the existing Plan were given opportunities to participate in the SRO and VRP. However, in exchange for the exercise of this early retirement option, the eligible employee/participant was required to release and discharge the defendant Lockheed from almost all claims arising out of, or in any way related to, her/his employment with defendant Lockheed or the termination of that employment and to refrain from participating in any lawsuit to assert any such claims. Additionally, the company required eligible employees and participants to indemnify and hold defendant Lockheed harmless from all loss or damage, including attorney's fees, arising out of the breach of any release. The benefits paid under the SRO and VRP were and continue to be funded almost entirely by surplus Plan assets, assets which are currently held in trust for the sole and exclusive benefit of the Plan's participants and beneficiaries. Thus, the Plan's assets were used at least in part by defendant Lockheed to relieve itself of various liabilities or potential liabilities to thousands of its employees.

61. Defendants Lockheed, Tellep, Fuhrman and Marafino violated ERISA by adopting the May 8, 1990 amendments which provided for the SRO and VRP options in that this action misused Plan assets by manipulating those assets for the benefit of defendant Lockheed. Defendant Lockheed failed to discharge its duties as Plan Sponsor solely in the interest of participants and their beneficiaries in violation of the provisions of the Plan, Trust Agreement, and ERISA, all of which prohibit the use or diversion of any Plan funds for any purpose other than for the sole and exclusive benefit of Plan participants and their beneficiaries.

62. Defendants Anderson, Barnard, Berry, Braunagel, Bronco, Northcutt, Skowronski, Van Shaick, and Vincent knew or should have known that the SRO and VRP options adopted as Plan

amendments on May 8, 1990, constituted a use of Plan assets for Defendant Lockheed. Said individual defendants were required to act so as to promptly terminate the misuse of surplus Plan assets by Defendant Lockheed but failed to do so. Instead, acting as Plan fiduciaries, said individual defendants implemented these Plan amendments by requiring participants to execute Settlement Agreements and Releases of claims against Defendant Lockheed to obtain the SRO and VRP benefits outlined above.

63. Each of the defendants, who participated in adopting, or were acting as fiduciaries with respect to the Plan in implementing the SRO and VRP amendments to the Plan, which misused surplus Plan assets by manipulating those assets for the benefit of Defendant Lockheed, violated ERISA in the following respects:

a. By failing to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries of the Plan and by failing to discharge their duties for the exclusive purpose of providing benefits to Plan participants and their beneficiaries in violation of ERISA § 404 (a) (l), 29 U.S.C. § 1104 (a) (1);

b. By failing to discharge their duties with respect to the Plan solely in the interest of the Plan participants and beneficiaries with the care, skill, prudence and diligence under circumstances that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise with the character and aims like those of the Plan in violation of ERISA § 404(a)(l)(B), 29 U.S.C. § 1104 (a) (1)(B);

c. By failing to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries in violation of the Provisions in the Plan and Trust Agreement prohibiting use or diversion of any

Plan funds for any purpose other than for the sole and exclusive benefit of the Plan participants and beneficiaries in violation of ERISA § 404(a)(1)(D), 29 U.S.C. § 1104 (a)(1)(D); and

d. By causing the Plan to engage in a transaction which they knew or should have known constituted a direct or indirect use of the Plan for the benefit of a party in interest (Defendant Lockheed) in violation of ERISA §§ 406(a) and (b), 29 U.S.C. §§ 1106 (a) and (b).

64. Defendants Lockheed, Tellep, Fuhrman and Marafino, by virtue of their status as a parties in interest and/or fiduciaries with respect to the Plan under ERISA, Sections 3(14)(21)(A), 29 U.S.C. 1002(14)(21)(A), and any other of the defendants who are found liable for breaches of duty during their tenure as Plan fiduciaries, are personally liable to make restitution to the Plan for the value of the use of Plan assets resulting from any such breach and to restore to the Plan any profits which they made through the use of Plan assets, and are subject to any such other equitable or remedial relief as this Court deems appropriate, all in accordance with ERISA, Sections 409(a) and 502(a)(2) and (3), 29 U.S.C. §§ 1109(a) and 1132(a) (2) and (3), as well as pursuant to the Plan document and Trust Agreement.

COUNT IV
ERISA–FAILURE TO FOLLOW TERMS OF PLAN SECTION 502 (a)(1)(B) OF ERISA, 29 U.S.C. § 1132(a)(1)(B)
(Individual Claim)

65. Spink restates and realleges and incorporates by this reference Paragraphs 1 through 34, and Paragraphs 37 through 45, all inclusive, as though fully set forth herein.

66. Spink brings this claim Section 502(a) (1) (B), 29 U.S.C. § 1132 (a)(1)(B), to recover benefits due to him under the terms of the Plan, to enforce his rights under the terms of the Plan, and to clarify his right to future benefits under the terms of the plan.

67. Upon information and belief, the version of the Plan in effect in 1979 provided that Lockheed employees would become participants in the Plan if they were less than 60 years old when they first began working for Lockheed. Spink was 22 years old when he first was hired by Lockheed in 1939.

68. In or about 1984, Lockheed informed Spink that he would not be considered a participant or member of the Plan because he was over age 60 when he was rehired by Lockheed in 1979. In response, Spink inquired as to whether this was, in fact, Lockheed's position regarding how the Plan applied to Spink and challenged Lockheed's position as unfair and, given his prior service to Lockheed beginning in or about 1939, contrary to the terms of the Plan. Lockheed denied Spink's request for membership in and prospective benefits from the Plan, making clear that Lockheed would maintain its position that Spink was not eligible to participate in the Plan because of his age at the time of his rehire in 1979, and that any of Spink's years of service with Lockheed would not be considered in determining his eligibility to participate in the Plan or the calculation and/or accrual of any benefits due him under the Plan.

69. Defendants have breached and continue to breach the terms of the Plan, thereby violating ERISA, by failing and refusing to consider Spink's pre-1979 years of service with Lockheed in determining whether he was eligible to be a participant in the Plan as of his rehire in 1979 and in calculating the benefits to which he is entitled under the Plan.

70. As a direct and proximate result of defendants' conduct as alleged herein, Spink has lost and will continue to lose Plan benefits to which he is entitled, and has lost and will continue to lose opportunities for additional benefits, including but not limited to the opportunities represented by the Special Retirement Opportunity ("SRO") and the 1990 Voluntary Retirement Program ("VRP") which were provided in or about May, 1990. Unless and until this court enjoins defendants' unlawful conduct as alleged herein, said conduct will continue to cause irreparable injury to Spink, who has no adequate remedy at law. Further, relief by damages alone for defendants' continuing unlawful practices would require a multiplicity of suits.

COUNT V
Promissory Estoppel

71. Spink restates and realleges and incorporates by this reference Paragraphs 1 through 34, Paragraphs 37 through 45, and Paragraphs 67 through 69, all inclusive, as though fully set forth herein.

72. Prior to the time he returned to Lockheed in 1979, Spink was employed by Hughes Helicopters, and he is informed and believes that he was due to receive pension benefits from Hughes so long as he continued working for the company through at least October 31, 1982. In offering to employ Spink in 1979, Lockheed, through its authorized agent or employee, represented to Spink that if he accepted employment with Lockheed, Spink would be a participant in the Plan and would accrue credited service toward retirement benefits under the Plan during his subsequent employment with Lockheed. In reliance upon this representation, Spink left his employment with Hughes to work for Lockheed, thereby relinquishing his membership in Hughes's retirement plan.

73. At or about the time of Spink's return to Lockheed in 1979, and continuing through approximately 1983, Lockheed made representations to Spink that he was and would continue to be during his employment with Lockheed a participant in the Plan, and that he was accruing and would continue to accrue credited service toward retirement benefits under the Plan.

74. As a direct and proximate result of Lockheed's conduct as alleged herein, Spink has lost and will continue to lose Plan benefits to which he is entitled, and has lost and will continue to lose opportunities for additional benefits, including but not limited to the opportunities represented by SRO and/or VRP which were provided in or about May, 1990.

75. So as to ensure the Plan's future compliance with defendants' representations to Spink, Spink seeks to have the Court order specific enforcement of the terms of his contract with Lockheed to the effect that he has been a participant of the Plan since at least his rehire in 1979 and that his current and future benefits shall be calculated accordingly.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court enter judgment for him and the class members he represents, granting the following relief:

1. A order declaring defendant's policy or practice of denying, on the basis of age, full benefits to Spink and the class he represents, as described more fully above, to be a violation of ERISA and the ADEA, and entering a preliminary and permanent injunction barring defendants from maintaining and/or applying said policy or practice.

2. An order voiding all settlement agreements and releases required by the Plan amendments of May 8, 1990, and

signed by Lockheed employees in order to receive benefits under the SRO and VRP options offered pursuant to those amendments.

3. An order providing that all eligible participants in the Plan, who earlier chose not to avail themselves of the SRO or VRP, be given notice of the opportunity and right to now so elect to exercise those options without surrendering any rights they might otherwise have to make claims against defendant Lockheed, with retroactive benefits where applicable, all at the expense of those defendants who are found to have violated their fiduciary duties to the Plan.

4. An order requiring restitution by defendants to the Plan of the value of their use of surplus Plan assets to the extent of the value of their use of such assets, and irrevocably transferring said amount to the Plan (*i.e.*, prohibiting its reversion to the Plan Sponsor) for the exclusive benefit of the Plan's participants and beneficiaries.

5. An order requiring defendants, and each of them, to personally restore to the Plan all profits made by them through the use of Plan assets.

6. An order declaring that Spink is entitled to have his eligibility to participate in and his benefits under the Plan to be determined by reference to all of his years of service with the Plan, including but not limited to those years prior to 1979, and enjoining defendants from failing or refusing to do so.

7. Specific enforcement of the contract which arose between Lockheed and Spink upon his rehire in 1979, as is more fully set forth above.

8. An award of monetary damages to restore Spink and all affected class members to the position which they would have held but for the defendants' contractual and statutory violations as alleged herein.

9. A liquidated damages award equal to their monetary losses for Spink and each class member whose rights under the ADEA were violated by Lockheed's willful conduct as alleged herein.

10. An award of attorneys' fees, litigation expenses, prejudgment interest, and any other appropriate relief.

Dated: February 5, 1992

Respectfully submitted,

TRABER & VOORHEES

By/s/Theresa M. Traber
Theresa M. Traber
Attorneys for Plaintiffs

DEMAND FOR A JURY TRIAL

Plaintiff Paul L. Spink hereby demands for himself and for the class of similarly situated individuals that the ADEA claims and Spink's common law claim of promissory estoppel.

Dated: February 5, 1992

Respectfully Submitted,

TRABER & VOORHEES

By/s/Theresa M. Traber
Theresa M. Traber
Attorneys for Plaintiffs

GORDON E. KRISCHER
DAVID E. GORDON
PAUL BORDEN
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, California 90071-2899
(213) 669-6000

Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL L. SPINK, individually and on behalf of a class of similarly individuals, Plaintiffs, v. LOCKHEED CORPORATION, et al., Defendants.	CASE NO. CV 92 0800 SVW (GHKx) NOTICE OF MOTION AND MOTION OF DEFENDANTS TO DISMISS COMPLAINT (Fed. R. Civ. P. 12(b)(6)) Hearing Date: April 27, 1992 Time: 1:30 p.m. Courtroom: No. 6

PLEASE TAKE NOTICE that on Monday, April 27, 1992, at 1:30 p.m., or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Stephen V. Wilson, District Judge, at the United States Courthouse, 312 North Spring Street, Los Angeles, California, defendants Lockheed Corporation, Daniel M. Tellep, Robert A. Fuhrman, Vincent N. Marafino, K. H. Anderson, L. J. Barnard, R. W. Berry, P. N. Braunagel, D. L. Bronco, R. H. Northcutt, W. E. Skowronski, A. G. Van Shaick, and W. T. Vincent will move and hereby do move this Court to dismiss the Complaint herein. This motion is made, pursuant to Federal Rule of Civil Procedure 12(b)(6), on the ground that the Complaint fails to state a claim upon which relief can be granted.

The motion is based on plaintiffs' Complaint, plan documents and correspondence referenced in the Complaint which are attached as exhibits to the Declarations of Robert G. Kropf and Gordon E. Krischer in support of defendants' motion to dismiss the Complaint, filed concurrently herewith, and on defendants' Memorandum of Points and Authorities In Support of Defendants' Motion to Dismiss the Complaint.

DATED: April 1, 1992.

Respectfully submitted,

O'MELVENY & MYERS
GORDON E. KRISCHER
DAVID E. GORDON
PAUL BORDEN

By/s/Gordon E. Krischer
Gordon E. Krischer
Attorneys for Defendants
Lockheed Corporation, et al.

[Declaration of Service omitted in printing]

LOCKHEED'S RESPONSE TO PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSIONS PROPOUNDED TO DEFENDANT LOCKHEED CORPORATION (EXCERPT FROM EXHIBIT B TO GORDON E. KRISCHER'S DECLARATION IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS)

GORDON E. KRISCHER
DAVID E. GORDON
PAUL BORDEN
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, California 90071-2899
(213) 669-6000

Attorneys for Defendants
LOCKHEED CORPORATION

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL L. SPINK, individually and on behalf of a class of similarly situated individuals, Plaintiffs, vs. LOCKHEED CORPORATION, et al., Defendants.	Case No. CV 92 0800 SVW (GHKX) LOCKHEED'S RESPONSE TO PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSIONS PROPOUNDED TO DEFENDANT LOCKHEED CORPORATION

PROPOUNDING PARTY: PLAINTIFF PAUL SPINK
RESPONDING PARTY: DEFENDANT LOCKHEED CORPORATION
SET NO.: ONE

Defendant Lockheed Corporation ("Lockheed") hereby responds to plaintiff's first set of requests for admissions pursuant to Rule 36 of the Federal Rules of Civil Procedure. In its response, Lockheed incorporates by reference the definitions set forth in Section I of plaintiff's first set of requests for admissions as though fully set forth herein.

REQUEST NO. 1:

ADMIT OR DENY that the document attached as Exhibit A hereto sets forth the manner in which plaintiff's benefits are calculated under the Plan.

RESPONSE TO REQUEST NO. 1:

Lockheed admits that the document attached as Exhibit A hereto sets forth the manner in which plaintiff Paul Spink's benefits are calculated under the Plan.

* * * *

Dated: March 31, 1992.

Respectfully submitted,

O'MELVENY & MYERS
GORDON E. KRISCHER

By/s/Gordon E. Krischer
Gordon E. Krischer
Attorneys for Defendant
Lockheed Corporation

[Declaration of Service omitted in printing]

LETTER FROM TELLEP TO SPINK
(EXHIBIT A TO LOCKHEED'S RESPONSE
TO PLAINTIFF'S FIRST SET OF
REQUESTS FOR ADMISSIONS)

LOCKHEED CORPORATION
4500 Park Granada Boulevard
Calabasas, California 91399
(818) 712-2610

Dan Tellep
Chairman of the Board
and Chief Executive Officer
June 20, 1990

Mr. Paul Spink
4624 El Reposo Drive
Los Angeles, California 90065

I have received your letter of June 7, 1990, and your comments on recent changes in the rules and regulations governing defined benefit pension plans and their impact on your benefit entitlement under Lockheed's retirement plan. You are obviously well informed on the issues and I appreciate the opportunity to clarify the matter.

On May 14, 1979, when you came to work at Lockheed, the retirement plan provisions precluded eligibility for employees hired after the age of 60. This policy was adopted since the regulations at that time required the granting of a retirement benefit upon the attainment of age 65. It did not seem fair to us that a person could be hired over 60 years of age and work for a very short time and receive a benefit.

Subsequently, the Omnibus Reconciliation Act (OBRA) and the Tax Reform Act of 1986 (TRA 86), and corresponding regulations required changes in the retirement plan provisions regarding credited service and plan participation. One change dealt with current plan participants who were over age 65. Under the new regulations effective December 25, 1988, active employees who had been plan participants prior to that date would receive retroactive retirement plan credit for their post age 65 service. This required change does not apply in your situation since you

were not a plan participant prior to the effective date. In other words, the new rules do not require retirement service credit for periods before an employee became a participant in the plan, even if participation was previously excluded on account of age. The AARP article you enclosed with your letter ignores this particular aspect of the new regulations.

Another required change dealt with plan participation and directly applies to your situation. Effective December 25, 1988, the regulations require the commencement of plan participation for active employees previously excluded from participating because of the attainment of a certain age. Additionally, the regulations require the accrual of credited service from the effective date forward and the recognition of all prior service for vesting purposes under the plan. The change provided that a person hired over age 60 could earn a retirement benefit provided that employment period was long enough.

Since age 65 did not automatically result in a benefit, we began to give credited service for years worked after December 25, 1988. While credited service was not made retroactive, all service prior to December 25, 1988, would be counted to determine if the employee worked long enough to earn a benefit. Consequently, all of your Lockheed service is recognized for plan vesting, but only your service after December 25, 1988, is recognized for benefit determination. In other words, you are now a participant in a benefit plan that you had no expectation of participating in at the time of your hire. However, the benefit from the plan is not as great as it could be if all your service was included.

To summarize, the new rules and regulations have established requirements that are different for employees who were previous plan participants than for those who were not. Complying with these regulations, which we have done, surely cannot be viewed as unethical. The rules and regulations that govern the retirement plan are not of Lockheed's making. Whether or not

those regulations are arbitrary is not within our control. The regulations set forth standards under which the plan must be administered, and on that score, we are totally compliant.

On the matter of the 44 months of service reflected on your 1982 Employee Benefit Statement, I can offer no explanation other than it was an error. It was discovered after your 1982 Statement was issued and that is why your 1983 Statement reflected no retirement service. The credited service on your 1989 Statement is correct and will continue to increase, as will your retirement benefit until such time as you elect to have your benefit payments commence.

You have also questioned why $12,300 in life insurance was not reflected on your 1989 Statement. Actually, the $12,300 you refer to is not life insurance but a death benefit provided from the retirement plan. It is based on a percentage of the group term life insurance you have as an active employee. The death benefit from the retirement plan has never been included on the Employee Benefit Statement. In your case, you have $123,000 term life insurance as an active employee. Your term life insurance is properly reflected on your 1989 Statement.

Thank you for providing an opportunity to clarify some of the very complex provisions of the Lockheed Retirement Plan. If you have any further questions on the technical aspects of the Plan, please contact Mr. Chuck Fiore, Manager of Employee Benefits, at (818) 712-2406.

I appreciate your interest and your years of service to Lockheed.

Sincerely,

/s/ Dan Tellep

cc: Lockheed Board of Directors

GORDON E. KRISCHER
DAVID E. GORDON
PAUL BORDEN
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, California 90071-2899
(213) 669-6000

Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL L. SPINK, individually and on behalf of a class of similarly situated individuals, Plaintiffs, vs. LOCKHEED CORPORATION, et al., Defendants.	Case No. CV 92 0800 SVW (GHKX) DECLARATION OF ROBERT G. KROPF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT (Fed. R. Civ. P. 12(b)(6)) Hearing Date: April 27, 1992 Time: 1:30 p.m. Courtroom: No. 6

I, ROBERT G. KROPF, declare and state as follows:

1. I have been employed at Lockheed Corporation ("Lockheed") since 1978. My position at Lockheed is Corporate Retirement Plan Manager.

2. In that capacity, I am familiar with the documents attached to this Declaration as Exhibits A, B, and C. Based on my own knowledge, I could testify that:

A. Exhibit A is a true and correct copy of the Lockheed Retirement Plan for Certain Salaried Employees (as amended December 17, 1990), which incorporates revisions made to the Plan to comply with the Omnibus Budget Reconciliation Act of 1986 (P.L. 99-509) and, at Sections 15.02 and 15.03 (pages 183 through 194), the provisions of the 1990 Special Retirement Program and the 1990 Voluntary Retirement Program;

B. Exhibit B is a true and correct copy of the Lockheed Retirement Plan for Certain Salaried Employees that was in effect in May, 1979; and

C. Exhibit C is a true and correct copy of a Certified Copy of Resolutions adopting the 1990 Special Retirement Opportunity, which includes the 1990 Special Retirement Program and the 1990 Voluntary Retirement Program.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED this 1st day of April, 1992, at Calabasas, Los Angeles County, California.

/s/ Robert G. Kropf
ROBERT G. KROPF

RELEVANT PROVISIONS OF THE LOCKHEED RETIREMENT PLAN FOR CERTAIN SALARIED EMPLOYEES, AS AMENDED DECEMBER 17, 1990 (EXCERPTS FROM EXHIBIT A TO DECLARATION OF ROBERT G. KROPF)

LOCKHEED RETIREMENT PLAN
FOR CERTAIN SALARIED EMPLOYEES
(as Amended December 17, 1990)

* * * *

SECTION 1.01 - "Administrator of the Plan" shall mean the Retirement Plan Committee or such other person duly appointed by resolution adopted by the Board of Directors.

* * * *

SECTION 1.10 - "Credited Service" shall mean the sum of "Past Service" and "Future Service", as those terms are defined in Sections 4.03 and 4.04.

* * * *

SECTION 1.11 - "Employee" shall mean a person employed by one or more of the Corporations.

* * * *

SECTION 1.14 - "Hour of Service", shall mean each hour credited to an Employee pursuant to the following Subsections (A), (B), (C) and (D):

(A) Each hour for which an Employee is paid, or entitled to payment, for the performance of duties for the Corporation or a parent, subsidiary or affiliate thereof during the applicable computation period.

(B) Each hour for which an Employee is paid, or entitled to payment, by the Corporation or a parent, subsidiary or affiliate thereof on account of a period of time during which no duties are performed (irrespective of whether the employment relationship has terminated) due to vacation, holiday, sick leave, jury duty, military reserve training leave or other paid time off provided that no hours shall be credited under this Subsection (B) on account of payments made or due under a plan maintained solely to comply with applicable workers compensation, unemployment compensation or disability insurance laws or on account of payments made solely to reimburse an Employee for medical or medically related expenses.

(C) Each hour for which back pay, irrespective of mitigation of damages, is awarded or agreed to by the Corporation or a parent, subsidiary or affiliate thereof, provided that no hour for which an Employee was given credit pursuant to Subsection (A), (B) or (D) of this Section shall also be credited to such Employee under the terms of this Subsection (C).

(D) Each hour an Employee in a Covered Group was serving in the Armed Forces provided such Employee was required to be reemployed by the Corporation pursuant to the terms and conditions of 38 U.S.C. §§ 2021, et seq. and further provided such employee was so reemployed. Such Employee shall be credited at the rate of forty-five (45) hours per week during the period he would normally have been scheduled to work in a Covered Group for the Corporation during such period of absence.

* * * *

SECTION 1.16 - "Member" shall mean an Employee who was or is a participant in the Plan pursuant to the terms of Sections 2.01 and 2.02.

* * * *

SECTION 1.20 - "Plan Year" shall mean the twelve (12) month period beginning with a December 25 and ending with the next succeeding December 24.

* * * *

SECTION 1.27 - "Week of Service" shall mean a payroll week (which is a seven (7) consecutive day period) in which an Employee is credited with one (1) or more Hours of Service. With respect to an Employee who is classified as part-time or call-in, a week of service shall be counted for each forty (40) Hours of Service earned under the Plan. All Weeks of Service shall be calculated in a manner consistent with the terms of Sections 2530.200b-2 and 2530.200b-3 of Title 29 of the Code of Federal Regulations.

* * * *

SECTION 1.29 - "Year of Service" shall mean a Plan Year in which an Employee completes twenty-two (22) or more Weeks of Service.

* * * *

SECTION 2.01 Commencement of Membership.

(A) * * * *

(B) After December 24, 1976, an Employee shall become a Member upon being employed in a Covered Group.

(C) Notwithstanding any other provision of the Plan to the contrary, no Employee may become a Member if he commences employment on or after December 25, 1976, and, at the time of such commencement of employment, is sixty (60) years of age or older. This restriction shall not apply on or after December 25, 1988. An Employee who was excluded from the Plan under Section 2.01 as in effect prior to December 25, 1988 shall become a Member on December 25, 1988 but shall not receive Credited Service for his pre-Member service.

* * * *

SECTION 4.01 GENERAL.

A Member's eligibility for benefits under the Plan and the amount of a Member's benefit are determined on the basis of service. In general, Section 4.02 provides for the crediting of all Years of Service for purposes of determining benefit eligibility; whereas, Section 4.03 and Section 4.04 provide that only periods of actual participation in the Plan are taken into account in calculating the amount of the benefits.

* * * *

SECTION 4.04 Future Service for Benefit Calculation Purposes.

(A) * * * *

(B) Plan Years on or after December 25, 1976. For Plan Years commencing on or after December 25, 1976, Future Service of each Member shall be credited for each Plan Year on the basis of the Member's Weeks of Service in a Covered Group during any such Plan Year and prior to his retirement. Any Plan Year beginning on or after December 25, 1976 in which a Member has forty-five (45) or more Weeks of Service in a Covered Group shall be credited as a full year of Future Service. When a Member's

total Weeks of Service in a Covered Group during a Plan Year are less than forty-five (45), a credit in units of one-twelfth (1/12) years of Future Service shall be given. The number of units of one-twelfth (1/12) years shall be computed as follows:

> Such Member's total Weeks of Service in a Covered Group in such Plan Year shall be divided by three and three-fourths (3-3/4); any fraction of more than one-half (1/2) in such quotient shall be rounded out to the next whole number and any fraction of one-half (1/2) or less shall be dropped.

(C) Post-Normal Retirement Age Service.

(1) A Member who does not have one Hour of Service on or after December 25, 1988 shall not be entitled to Credited Service for employment after such Member attains age sixty-five (65), except that any Member who was permitted to continue in employment past age sixty-five (65) pursuant to Section 5.01(B) prior to January 1, 1979, shall be entitled to accrue Credited Service for employment past age sixty-five (65) up to January 1, 1979, or until attainment of age sixty-eight (68), whichever shall have occurred first.

(2) A Member who has one Hour of Service on or after December 25, 1988 shall be entitled to Credited Service for employment after such Member attains age sixty-five (65), except as provided in Section 2.01(C) or Section 6.01(A). The accrued benefit of a Member who is receiving benefits under this Plan while still an Employee shall be recomputed as of the beginning of each Plan Year following his benefit commencement date. The increase in benefits, if any, since the prior calculation date shall be reduced by the actuarial equivalent of the accumulated

payments to which he was entitled under the single life annuity form since his most recent benefit calculation date.

* * * *

SECTION 5.01 Normal Retirement.

(A) Eligibility Rule. On or after December 25, 1976, any Member who shall have attained Normal Retirement Age shall be entitled to retire and, by Filing With The Committee, receive a monthly Normal Retirement benefit.

(B) Continued Employment. A Member who otherwise meets the requirements for retirement and who continues in full-time employment with the Corporation after attaining age sixty-five (65) shall not be entitled to receive a monthly Normal Retirement Benefit or Deferred Monthly Retirement Benefit while continuing on such full-time employment, but if his employment is on less than a full-time basis he shall be entitled to receive a monthly Normal Retirement Benefit and/or a Deferred Monthly Retirement Benefit, as the case may be, while continuing on his less than full-time employment and such benefits shall not be subject to suspension unless his employment becomes full-time employment. A Member who so continues in less than full-time employment shall not be given further Credited Service for the periods in such less than full-time employment.

SECTION 5.02 Early Retirement.

(A) General Eligibility Rule. On or after December 25, 1976, any Member who has attained age fifty-five (55), but not age sixty-five (65), and who has ten (10) or more Years of Service may retire and, by Filing With The Committee, receive a monthly Early Retirement Benefit in lieu of a monthly Normal Retirement Benefit. For purposes of this paragraph 5.02(A), a Member must File With The Committee within the twelve (12) month period next following such Member's break in Continuous Service.

(B) Special Rule. In the event a Member who has attained age fifty-five (55), but not age sixty-five (65), has less than ten (10) Years of Service, but has completed ten (10) or more years of Continuous Service, such Member, for the sole purpose of meeting the requirement of this Section 5.02, shall be deemed to have met such requirements.

(C) Continued Employment. A Member who retires under the provisions of this Section 5.02 and who continues in less than full-time employment with the Corporation after such early retirement shall be entitled to receive a monthly Early Retirement Benefit while continuing on his less than full-time employment and such benefits shall not be subject to suspension unless his employment becomes full-time employment. A Member who so continues in less than full-time employment shall not be given further Credited Service for the periods in such less than full-time employment.

* * * *

SECTION 13.01 Named Fiduciary. The following persons shall be Named Fiduciaries under the Plan and Trust Agreement, and shall be the only Named Fiduciaries hereunder:

(A) The Trustee. Any Trustee designated hereunder shall be a bank or trust company qualified under the laws of the United States or of any state to operate thereunder as a trustee.

(B) Lockheed Corporation, as Plan Sponsor. Any authority assigned or reserved to the Corporation under the Plan and Trust Agreement shall be exercised by resolution of the Board of Directors. Such a resolution shall become effective with respect to the Trustee upon receipt by the Trustee of a certified copy of such Board of Directors' resolution.

(C) The Retirement Plan Committee, as Administrator of the Plan. The Retirement Plan Committee shall be appointed to

serve as Administrator by resolution duly adopted by the Board of Directors. Whenever a Retirement Plan Committee is so appointed, the Corporation shall advise the Trustee of the name or names of the person or persons so appointed by providing to the Trustee a certified copy of such Board of Directors' resolution, and the Trustee may assume that such person or persons shall continue in office until advised differently in the same manner. Whenever the Trustee must or may act upon the direction or approval of the Retirement Plan Committee, the Trustee may act upon written communication signed by a majority of such Committee, or any agent appointed in writing by a majority of such Committee to act on the Retirement Plan Committee's behalf, and the authority of any such agent shall be deemed to continue until revoked in writing. In such case, the Trustee shall not be responsible for failure to act without such a communication.

SECTION 13.02 Responsibilities of Named Fiduciaries.

Responsibilities shall be allocated among the Named Fiduciaries as follows:

(A) * * * *

(B) Lockheed Corporation shall have the authority and responsibility for (1) the design of the Plan and Trust Agreement, including amendment of the Plan and Trust Agreement; (2) the qualification of the Plan under applicable law; (3) the designation of members of the Retirement Plan Committee; and (4) funding the Plan in accordance with applicable law and determinations of the Retirement Plan Committee.

(C) The Retirement Plan Committee shall have the responsibility, authority, and discretion necessary to control the operation and administration of the Plan in accordance with the terms of the Plan and Trust Agreement, including without limiting the generality of the foregoing, (1) all functions assigned to the

Retirement Plan Committee under the terms of the Trust Agreement; (2) all functions assigned to the Retirement Plan Committee under the terms of the Plan; (3) determination of benefit eligibility and amount and certification thereof to the Trustee; (4) hiring of persons to provide necessary services to the Plan; (5) issuance of directions to the Trustee to pay any fees, taxes, charges or other costs incidental to the operation and management of the Plan; (6) preparation and filing of all reports required to be filed by the Plan with any agency of Government; (7) compliance with all disclosure requirements imposed by state or federal law; (8) establishment of a funding policy within the meaning of Section 402(b)(1) of the Employee Retirement Income Security Act of 1974; (9) establishment and maintenance of a funding standard account within the meaning of Section 412(b) of the Internal Revenue Code; (10) the determination of the amounts needed to fund the Plan, and the payment of such amounts from Corporate funds to the Trustee; (11) maintenance of all records of the Plan other than those maintained by the Trustee; (12) interpretation and construction of Plan provisions; (13) establishment of procedures to be followed by Members and Beneficiaries in filing applications for benefits; (14) the appointment, removal and replacement of the Trustee; (15) the appointment, removal and replacement of one or more Investment Managers which shall be responsible for the management of such of the assets of the Trust Fund as the Retirement Plan Committee shall specify; and (16) the exercise of all fiduciary functions provided in the Plan or in the Trust Agreement or necessary to the operation of either, except such functions as are specifically assigned to other Named Fiduciaries. The Retirement Plan Committee may adopt such rules to govern its own procedures as it may deem advisable, provided that such rules are not inconsistent with the provisions and purposes of the Plan or Trust Agreement. The Retirement Plan Committee may designate other persons, including the Trustee, to carry out its duties and responsibilities, as it may deem appropriate or necessary. The Retirement Plan Committee shall, no less often than twice a year,

make a report to the Board of Directors of the current status of the operation and administration of the Plan and Trust Fund, which report shall be made in the form and manner determined by the Board of Directors. The Retirement Plan Committee shall periodically review the effect which voluntary withdrawals from the Plan made pursuant to Section 2.03 have on the qualified status of the Plan under applicable provisions of the Internal Revenue Code. In the event the Retirement Plan Committee determines that any further voluntary withdrawals may jeopardize the qualified status of the Plan, the Retirement Plan Committee shall so advise the Board of Directors and shall recommend that the Board of Directors amend the Plan to prohibit further voluntary withdrawals in order to protect the qualified status of the Plan.

SECTION 13.03 Allocation of Responsibilities. Each Named Fiduciary is allocated the individual responsibility for the prudent execution of the functions assigned to him, and none of such responsibilities or other responsibility shall be shared by two or more of such Named Fiduciaries unless such sharing shall be provided by a specific provision of the Plan or Trust Agreement. Whenever one Named Fiduciary is required by the Plan or Trust Agreement to follow the directions of another Named Fiduciary, the two Named Fiduciaries shall not be deemed to have been assigned a shared responsibility, but the responsibility of the Named Fiduciary giving the directions shall be deemed his sole responsibility, and the responsibility of the Named Fiduciary receiving those directions shall be to follow them insofar as such instructions are on their face proper under applicable law.

* * * *

SECTION 14.01 Amendment of Plan. The Corporation reserves the right to amend, modify, suspend or terminate the Plan by action of the Board of Directors. Except as provided in Section 12.03, no such action shall operate to recapture for the Corporation any contributions or payments previously made to any Trustee or

insurance company under the Plan, nor, except to the extent necessary to meet the requirements of the Commissioner of Internal Revenue or any other governmental authority, to adversely affect the benefits of Members already retired or the Retirement Fund then securing such benefits or the benefits of any Member under the provisions of Subsection (C)(3) of Section 5.03.

* * * *

SECTION 15.02 1990 Special Retirement Program.

(A) General. The provisions of this Section 15.02 set forth the terms of the "1990 Special Retirement Program" (the "Program"), insofar as the Program provides increased benefits under this Plan. This Program is available only to certain employees of the following entities (each of which is referred to below as an "Employing Company"): (1) The Lockheed Aeronautical Systems Company division of Lockheed Corporation ("LASC"), as such division existed on May 7, 1990; (2) Lockheed Western Export Company; (3) Lockheed Georgia International Services, Inc.; (4) Lockheed Corporation (International) S.A.; and (5) Lockheed International (GmbH).

(B) Eligibility for Benefits. To be eligible for the benefits described in Section 15.02(C), a Member must meet all of the following requirements:

(1) The Member must be a salaried Employee of an Employing Company who

(i) on or after May 8, 1990 was on the Employing Company's payroll (or on an approved leave of absence),

(ii) if employed by a Company named in paragraph (A)(2), (3), (4) or (5) above, is an

employee who normally reports to LASC in the course of his duties,

(iii) by June 30, 1990 qualifies for early or normal retirement under Section 5.01 or Section 5.02 of the Plan, and

(iv) receives a written layoff notice on or before June 30, 1990.

A Member who meets all of the above requirements is referred to below as an "Eligible Member."

(2) The Eligible Member must voluntarily elect to participate in this Program by executing forms prescribed by the Member's Employing Company and filing them, at the location designated by the Member's Employing Company, no earlier than 9:00 a.m. on May 16, 1990 and no later than 5:00 p.m. on June 30, 1990. Time references refer to the local time for a designated location.

(3) The Employing Company shall File With The Committee documentation stating the names of all Eligible Members who have satisfied conditions (1) and (2) above. The Employing Company shall furnish to each such Eligible Member a written notice of the date on which the Member's employment is scheduled by the Employing Company to end (the Member's "Termination Date"). To be entitled to the additional benefits described in Section 15.02(C), the Member must elect to retire on the Member's Termination Date by Filing With the Committee the forms normally required for such an election.

(4) The Eligible Member must agree (by executing a Settlement Agreement and General Release acceptable to the Eligible Member's Employing Company) to accept benefits under this Program in lieu of pursuing any claims

the Eligible Member may have against the Member's Employing Company or the Corporation arising from termination of employment or otherwise.

(5) The Eligible Member must thereafter actually terminate employment with the Corporation on the Eligible Member's Termination Date, unless the Member's employment is terminated earlier due to accident, illness, disability, or death.

Benefits under the Program are payable only under the circumstances just described. An Eligible Member who becomes entitled to benefits under the Program as a result of meeting all such requirements is referred to in this Section 15.02 as a "Participant". Benefits are not payable under the Program if, for example, an Eligible Member is discharged before the Eligible Member's Termination Date for poor performance or misconduct, as determined in the sole discretion of the Employing Company.

(C) Benefits. A Participant in this Program shall be entitled to the following special benefits:

(1) For purposes of Section 6.01, the Participant will be credited with three additional years of "Future Service" (subject to the forty year limit on Credited Service set forth in such Section). If the Participant is subject to mandatory retirement under the personnel policies of the Participant's Employing Company, the Participant shall not be credited with more Future Service under the preceding sentence than the Participant could have earned had the Participant continued employment until the Participant's mandatory retirement age.

(2) For purposes of Section 6.02, the Participant will be credited with three additional years of Future Service (subject to the forty year limit on Credited Service) and

will be deemed to be three years older than the Participant's chronological age shown on the Corporation's records on the Participant's Termination Date.

(3) Age and service credits granted under Section 15.02(C)(1) or 15.02(C)(2) shall not be taken into account in determining whether an individual is an Eligible Member.

(4) For purposes of Section 1.02 and 1.03 of the Plan, the Participant will be deemed to have continued to receive pay, for the period of additional Future Service credited under Section 15.02(C)(1), at the Participant's Weekly Rate of Compensation on the Rate Determination Day that last preceded the Participant's Termination Date.

(5) The evidence of good health requirements of Section 7.02(C) shall not apply to preclude the election of an optional annuity form by a Participant.

(D) Rescission of Layoff Notices. If an Employing Company rescinds the layoff notice of an Eligible Member prior to the Member's Termination Date, the individual shall cease to be an Eligible Member who may participate in this Program. However, the individual may then become eligible for the 1990 Voluntary Retirement Program (see Section 15.03).

(E) Date Employment is to End. Each Employing Company shall establish a Termination Date for each Participant it employs. The Participant shall cease to be an Employee on the Participant's Termination Date. A Participant's Termination Date shall normally be on the date on which the Participant's active services are to end, as set forth in the layoff notice issued to the Participant. However, the Employing Company shall have the right to schedule a later Termination Date, but such Date shall be no later than March 31, 1991 unless the Participant consents

otherwise. The Employing Company may postpone a Participant's scheduled Termination Date on at least two weeks notice to the Participant, but not past March 31, 1991 unless the Participant consents otherwise. A Participant's Termination Date may be accelerated by agreement of the Participant and the Employing Company.

(F) Effect of Reemployment on Benefits. The special benefits provided under Section 15.02(C) shall only be payable during the period following a Participant's Termination Date and preceding the Participant's recommencement of full-time employment with the Corporation. Hence, if a Participant is reemployed by the Corporation after the Participant's Termination Date and the Participant's benefits under the Plan are suspended because of reemployment (in accordance with Section 10.06), all special benefits under Section 15.02(C) shall cease and they shall not thereafter recommence even if the Participant's retirement benefits again become payable.

(G) Duration of the Program. This Program is intended to be a temporary program and no one may elect to participate in the Program after 5:00 p.m. (local time) on June 30, 1990.

SECTION 15.03 1990 Voluntary Retirement Program.

(A) General. The provisions of this Section 15.03 set forth the terms of the "1990 Voluntary Retirement Program" (the "Program"), insofar as the Program provides increased benefits under this Plan. This Program is available only to certain employees of the following entities (each of which is referred to below as an "Employing Company"): (1) the Lockheed Aeronautical Systems Company division of Lockheed Corporation ("LASC"), as such division existed on May 7, 1990; (2) Lockheed Western Export Company; (3) Lockheed Georgia International Services, Inc.; (4) Lockheed Corporation (International) S.A.; and (5) Lockheed International (GmbH).

(B) Eligibility for Benefits. To be eligible for the benefits described in Section 15.03(C), a Member must meet all of the following requirements:

(1) The Member must be a salaried Employee of an Employing Company who

(i) on or after May 8, 1990 was on the Employing Company's payroll (or on an approved leave of absence),

(ii) if employed by a Company named in paragraph (A)(2), (3), (4), or (5) above, is an employee who normally reports to LASC in the course of his duties,

(iii) by June 30, 1990 qualifies for early or normal retirement under Section 5.01 or Section 5.02 of the Plan, and

(iv) is not ineligible for the Program.

A Member shall be ineligible if the Member is listed on the schedule attached to this Program. A Member who is notified prior to June 30, 1990 that the Member is being laid off is ineligible for the Program unless the Member's resignation pursuant to the Program was accepted by the Member's Employing Company before the issuance of the layoff notice. Such a Member is referred to below as an "Eligible Member."

(2) The Eligible Member must voluntarily resign by executing forms prescribed by the Member's Employing Company and filing them, at the location designated by the Member's Employing Company, no earlier than 9:00 a.m. on May 16, 1990 and no later than 5:00 p.m. on June 30,

1990. Time references refer to the local time for a designated location.

(3) The Employing Company shall File With The Committee documentation stating the names of all Eligible Members who have satisfied conditions (1) and (2) above. The Employing Company shall furnish to each such Eligible Member a written notice of the date on which the Member's employment is scheduled by the Employing Company to end (the Member's "Termination Date"). To be entitled to the additional benefits described in Section 15.02(C), the Member must elect to retire on the Member's Termination Date by Filing With the Committee the forms normally required for such an election.

(4) The Eligible Member must agree (by executing a Settlement Agreement and General Release acceptable to the Eligible Member's Employing Company) to accept benefits under this Program in lieu of pursuing any claims the Eligible Member may have against the Member's Employing Company or the Corporation arising from termination of employment or otherwise.

(5) The Eligible Member must thereafter actually terminate employment with the Corporation on the Eligible Member's Termination Date, unless the Member's employment is terminated earlier due to accident, illness, disability, or death.

Benefits under the Program are payable only under the circumstances just described. An Eligible Member who becomes entitled to benefits under the Program as a result of meeting all such requirements is referred to in this Section 15.03 as a "Participant". Benefits are not payable under the Program if, for example, an Eligible Member is discharged before the Eligible Member's Termination Date for poor performance or misconduct,

as determined in the sole discretion of the Employing Company, or resigns before such Termination Date, even if the individual has elected to participate in this Program.

(C) Benefits. A Participant in this Program shall be entitled to the following special benefits:

(1) For purposes of Section 6.01, the Participant will be credited with three additional years of "Future Service" (subject to the forty year limit on Credited Service set forth in such Section). If the Participant is subject to mandatory retirement under the personnel policies of the Participant's Employing Company, the Participant shall not be credited with more Future Service under the preceding sentence than the Participant could have earned had the Participant continued employment until the Participant's mandatory retirement age.

(2) For purposes of Section 6.02, the Participant will be credited with three additional years of Future Service (subject to the forty year limit on Credited Service) and will be deemed to be three years older than the Participant's chronological age shown on the Corporation's records on the Participant's Termination Date.

(3) Age and service credits granted under Section 15.03(C)(1) or 15.03(C)(2) shall not be taken into account in determining whether an individual is an Eligible Member.

(4) For purposes of Section 1.02 and 1.03 of the Plan, the Participant will be deemed to have continued to receive pay, for the period of additional Future Service credited under Section 15.03(C)(1), at the Participant's Weekly Rate of Compensation on the Rate Determination Day that last preceded the Participant's Termination Date.

(5) The evidence of good health requirements of Section 7.02(C) shall not apply to preclude the election of an optional annuity form by a Participant.

(D) Date Employment is to End. Each Employing Company shall establish a Termination Date for each Participant it employs. The Participant shall cease to be an Employee on the Participant's Termination Date. A Participant's Termination Date shall normally be no later than June 30, 1990. However, the Employing Company shall have the right to schedule a later Termination Date, but such date shall be no later than March 31, 1991 unless the Participant consents otherwise. The Employing Company may postpone a Participant's scheduled Termination Date on at least two weeks notice to the Participant, but not past March 31, 1991 unless the Participant consents otherwise. A Participant's Termination Date may be accelerated by agreement of the Participant and the Employing Company.

(E) Effect of Reemployment on Benefits. The special benefits provided under Section 15.03(C) shall only be payable during the period following a Participant's Termination Date and preceding the Participant's recommencement of full-time employment with the Corporation. Hence, if a Participant is reemployed by the Corporation after the Participant's Termination Date and the Participant's benefits under the Plan are suspended because of reemployment (in accordance with Section 10.06), all special benefits under Section 15.03(C) shall cease and they shall not thereafter recommence even if the Participant's retirement benefits again become payable.

(F) Duration of the Program. This Program is intended to be a temporary program and no one may elect to participate in the Program after 5:00 p.m. (local time) on June 30, 1990.

* * * *

RELEVANT PROVISIONS OF THE LOCKHEED RETIREMENT PLAN FOR CERTAIN SALARIED INDIVIDUALS IN EFFECT AS OF MAY 1979 (EXCERPTS FROM EXHIBIT B TO DECLARATION OF ROBERT G. KROPF)

LOCKHEED RETIREMENT PLAN
FOR CERTAIN SALARIED EMPLOYEES
(AS IN EFFECT ON JANUARY 1, 1979)

* * * *

Section 1.16 - "Member" shall mean an Employee who was or is a participant in the Plan pursuant to the terms of Sections 2.01 and 2.02.

* * * *

Section 2.01 Commencement of Membership.

(A) * * * *

(B) * * * *

(C) Notwithstanding any other provision of the Plan to the contrary, no Employee may become a Member if he commences employment on or after December 25, 1976, and, at the time of such commencement of employment, is sixty (60) years of age or older.

* * * *

LOCKHEED CORPORATION BOARD OF DIRECTORS' CERTIFIED COPY OF RESOLUTIONS ADOPTING THE 1990 SPECIAL RETIREMENT OPPORTUNITY (EXCERPTS FROM EXHIBIT C TO DECLARATION OF ROBERT G. KROPF)

CERTIFIED COPY OF RESOLUTIONS

1990 Special Retirement Opportunity)

Upon motion duly made by Director Christopher, seconded by Director Ukropina, and unanimously carried by the affirmative vote of all of the Directors present, the preambles and resolutions set forth in Attachment G were adopted.

CERTIFICATION

I, WILLIAM T. VINSON, hereby certify that I am the duly elected and acting Vice President-Secretary of Lockheed Corporation; that the foregoing is a full, true and correct copy of resolutions duly adopted by the Board of Directors of said Corporation, at a meeting thereof duly held at the office of the Corporation in Calabasas, California, at 9:00 a.m., on Tuesday, the 8th day of May, 1990; and that said resolutions have not been rescinded or revoked.

IN WITNESS WHEREOF, I have hereunto signed my name as Vice President-Secretary and affixed the Seal of said Corporation this 6th day of December, 1990.

/s/ William T. Vinson
William T. Vinson
Vice President-Secretary

Attachment G to Minutes of
Meeting of Board of Directors
Held May 8, 1990

1990 Special
Retirement Opportunity

WHEREAS, this Corporation deems it is desirable to extend special retirement incentives to certain participants in the Lockheed Retirement Plan for Certain Salaried Employees (the "Plan"); and

WHEREAS, a voluntary program offering such incentives has been presented to and considered by this Board;

NOW, THEREFORE, BE IT RESOLVED that the attached 1990 Special Retirement Opportunity ("SRO") be, and hereby is, adopted effective as of the dates set forth therein; and

FURTHER RESOLVED, that each Employing Company, as such term is defined in the SRO, may, on a one-time basis on or before June 25 1990, amend the schedule of employees ineligible for the SRO, but only to delete names therefrom.

LOCKHEED CORPORATION

1990 SPECIAL RETIREMENT OPPORTUNITY

PURPOSE OF THE SRO

Lockheed Corporation has adopted the 1990 Special Retirement Opportunity (SRO) to provide special retirement benefits to certain salaried persons employed by certain of its divisions and subsidiaries. The SRO consists of two separate but similar programs: (1) The 1990 Special Retirement Program, which is available to certain laid off employees; and (2) the 1990 Voluntary Retirement Program, which is available to certain employees who have not been laid off. Each of these separate programs is referred to below as a "Program."

STRUCTURE OF EACH PROGRAM

Each Program consists of special retirement plan provisions and other related provisions. The eligibility provisions of each Program are set forth in full in the retirement plan provisions. These eligibility requirements are incorporated by reference into the other parts of the Program.

* * * *

[Note: Provisions of the 1990 Special Retirement Program and the 1990 Voluntary Retirement Program as adopted by Lockheed Corporation as amendments to the Lockheed Retirement Plan for Certain Salaried Employees by the foregoing resolutions are §§ 15.02 and 15.03 of the Plan, respectively, and are reproduced in this Joint Appendix, supra, at pages 49 through 57, inclusive.]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL L. SPINK, et al.,

Plaintiffs,

v.

LOCKHEED CORPORATION, et al.,

Defendants.

CASE NO. CV 92-800 SVW (GHKx)

July 31, 1992, Filed and Entered

ORDER GRANTING DEFENDANT LOCKHEED CORPORATION'S MOTION TO DISMISS

I. BACKGROUND

Paul L. Spink, the named Plaintiff, seeks additional pension benefits under the Lockheed Corporation Retirement Plan for Certain Salaried Employees (the "Plan") sponsored by the named Defendant, Lockheed Corporation ("Defendant"). Defendant first employed Plaintiff in 1939, and then intermittently through 1950. After an interim of nearly thirty years, Defendant again hired Plaintiff in May 1979. Under the Plan terms in effect at the time of his hire in 1979, Defendant lawfully excluded Plaintiff from participating in the Plan because he was over sixty years old. However, changes in federal law in 1986 compelled Defendant to permit Plaintiff to participate in the Plan beginning on December 25, 1988, the commencement date of the first fiscal Plan year following January 1, 1988. Plaintiff subsequently accrued benefits under the Plan until his retirement in June 1990.

In an effort to attenuate the effects of anticipated layoffs by inducing voluntary retirement, Defendant amended the Plan in 1990 to provide enhanced retirement benefits, allegedly paid out of surplus Plan funds, to participants deemed eligible to take early retirement. Participants choosing this option were required to sign a waiver of employment related claims. Although eligible, Plaintiff did not retire pursuant to this early retirement program.

In this action, Plaintiff alleges the following three claims in his individual capacity, and also on behalf of all similarly situated employees: first, statutory amendments to the federal law governing benefit plans allegedly require Defendant to provide retroactive participation and benefit accrual to all employees, like Plaintiff, who were excluded from Plan participation before 1988 because of age, and who have worked at least one hour in 1988; second, Defendant's 1990 Plan amendment allegedly breached a fiduciary duty in violation of federal law; and third, the same Plan amendment allegedly constituted a federally prohibited transaction because it benefitted Defendant, a party-in-interest. Finally, in a fourth claim brought solely in his individual capacity, Plaintiff alleges that he is personally owed retroactive benefits based on equitable estoppel stemming from Defendant's alleged oral misrepresentations.[1]

On April 2, 1992, Defendant filed this Motion to Dismiss the entire action, pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that: the relevant federal law is exclusively prospective regarding plan participation and benefit accrual; amending the Plan did not violate a fiduciary duty because no such duty applied; and, as pleaded, federal law does not allow recovery for alleged oral misrepresentations. The Court held a hearing on April 27, 1992 to consider this motion. Having considered the

---

[1] In response to Defendant's Motion to Dismiss, Plaintiff filed an amended opposition on April 17, 1992 withdrawing Count IV, a claim for benefits under the Plan, from his Complaint.

arguments of counsel, both written and oral, the Court GRANTS Defendant's Motion to Dismiss in its entirety because even assuming the truth of Plaintiff's allegations for the purposes of this Motion, Plaintiff fails to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

II. DISCUSSION

A. Alleged Violations of ERISA and ADEA

Plaintiff focuses on certain provisions of the Omnibus Budget Reconciliation Act of 1986 ("OBRA 1986"), 100 Stat. 1973, that amended the Employee Retirement Income Security Act of 1974 ("ERISA"), ch. 18, 88 Stat. 832 (codified as amended at 29 U.S.C. §§ 301-1144), the Age Discrimination in Employment Act ("ADEA"), ch. 14, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-34), and the Internal Revenue Code of 1986, 26 U.S.C. Prior to OBRA 1986, none of these statutes prevented an employer from denying participation in its pension plan to employees who were hired after age sixty if the normal retirement age was sixty-five. Indeed, both ERISA and the IRC specifically allowed this practice until OBRA 1986 proscribed it.

In order to accomplish comprehensive reform, OBRA 1986 amended ERISA, the ADEA, and the IRC together. Thus, OBRA 1986 amended the plan participation provisions of both ERISA, 29 U.S.C. § 1052(a), and the IRC, 26 U.S.C. § 410(a)(2), as well as the benefit accrual provisions of ERISA, 29 U.S.C. § 1054(b)(1)(H), the ADEA, 29 U.S.C. § 623(j), and the IRC, 26 U.S.C. § 411(b)(1)(H).

The central legal issue Plaintiff raises under OBRA 1986 concerns the effective dates of the amended provisions of ERISA and the ADEA, rather than their substantive provisions. Plaintiff asserts that the OBRA 1986 amendments entitle him to retroactive Plan participation, and concomitant benefit accrual, for those years

of employment following his hire in 1979 and preceding his initial Plan participation in 1988. Plaintiff's thesis is that Defendant failed to comply with the provisions of amended ERISA -- namely, 29 U.S.C. § 1052(a)(2) -- by not allowing him, once he had worked an hour of service in 1988, to participate retroactively in and, thus, to accrue benefits retroactively under the Plan.

The plain language of OBRA 1986, however, defeats Plaintiff's claim. The court holds that the relevant effective date provisions of the OBRA 1986 amendments to ERISA and the ADEA are *prospective* and thus do not provide Plaintiff the grounds to participate retroactively for periods of service prior to his joining the Plan on December 25, 1988, nor to receive retroactive benefit accrual.

First, as concerns Plan participation, OBRA 1986 § 9203(a) amended ERISA such that "[n]o pension plan may exclude from participation (on the basis of age) employees who have attained a specified age." *See* 29 U.S.C. § 1052(a)(2). However, OBRA 1986 § 9204(b) further states that "[t]he amendments made by section 9203 shall apply *only* with respect to plan years beginning on or after January 1, 1988, and *only* with respect to service performed on or after such date" (emphasis added). Thus, OBRA 1986 only required Defendant to allow Plaintiff to participate in the Plan beginning December 25, 1988 -- because that date marked the beginning of the first fiscal Plan year following January 1, 1988 -- and not for prior Plan years.

Second, because Plaintiff is not entitled to retroactive Plan participation, it follows that neither is he entitled to retroactive benefit accrual. To this end, the Court holds that one must first be a plan participant before one can enjoy benefit accrual. *See* 29 C.F.R. § 2530.204-1(b)(1) (service before an employee first becomes a plan participant is disregarded for benefit accrual purposes).

Moreover, the OBRA 1986 amendments concerning benefit accrual provide analogous support for the Court's conclusion. In particular, OBRA 1986 §§ 9201 and 9202 amended the benefit accrual language in both ERISA and the ADEA to make unlawful "the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's accrual on account of age." However, OBRA 1986 § 9204(a) plainly states that "[t]he amendments made by sections 9201 [ADEA] and 9202 [ERISA] shall apply *only* with respect to plan years beginning on or after January 1, 1988, and *only* to employees who have 1 hour of service in any plan year to which such amendments apply" (emphasis added). As such, it is apparent that Congress did not intend to retroactively impact benefit accrual provisions prior to January 1, 1988.

Given Congress' intention in this analogous context, Plaintiff cannot seriously argue that Congress nonetheless intended to allow retroactive benefit accrual predicated on retroactive plan participation. To reiterate, the Court finds Plaintiff's argument unsupported by the unambiguous statutory language. Section 9204(a), which concerns the effective dates of OBRA 1986's participation amendments, plainly states: "The amendments made by section 9201 [ADEA] and 9202 [ERISA] shall apply *only* with respect to plan years beginning on or after January 1, 1988, and *only* to employees who have 1 hour of service in any plan year to which such amendments apply" (emphasis added). Therefore, because the OBRA 1986 amendments only apply to Plan years beginning on or after January 1, 1988, Plaintiff is entitled neither to participate retroactively nor to accrue benefits retroactively for Plan years before 1988.

B. Alleged Violations Through Plan Amendment

Plaintiff next contends that in amending the Plan in 1990, Defendant breached its fiduciary duty under ERISA. This claim is based on the false assumption that amending the Plan constituted a fiduciary act. Plaintiff correctly observes that a corporate

sponsor must discharge its obligations solely in the interests of the participants and beneficiaries when acting in its role as plan administrator. However, where, as here, a defendant is both an employer *and* an administrator of a pension plan, it is subject to separate and differing responsibilities depending upon the role it is performing. As the Second Circuit has stated: "ERISA permits employers to wear 'two hats,' and . . . assume fiduciary status 'only when and to the extent' that they function in their capacity as plan administrator, not when they conduct business that is not regulated by ERISA." *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985) (*quoting Amato v. Western Union Int'l, Inc.*, 596 F. Supp. 963, 968 (S.D.N.Y. 1984)), *cert. denied*, 474 U.S. 1113 (1986). Therefore, when acting in its corporate capacity, Defendant was obligated to "see that such benefit plans as it [chose] to maintain [were] designed to further the company's business interests in consonance with the company's obligations to its stockholders." *Musto v. American General Corp.*, 861 F.2d 897, 910 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020; *see also Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986) ("ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan or investing its assets."), *cert. denied*, 481 U.S. 1016 (1987). As the Third Circuit explained:

> Virtually every circuit has rejected the proposition that ERISA's fiduciary duties attach to an employer's decision whether or not to amend an employee benefit plan. . . [It is] extremely unlikely that Congress, in defining an ERISA fiduciary in section 3(21)(A), intended that the word "administration" encompass amendment decisions, thus sweeping away by indirection the limitations so meticulously built into the participation and vesting requirements.

Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1161 (3rd Cir. 1990). The Sixth Circuit has similarly reasoned:

> There is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be. A company acts as a fiduciary in performing the first task, but not the second . . . . The case law . . . makes it clear that when an employer decides to establish, *amend*, or terminate a benefits plan, as opposed to managing any assets of the plan and administering the plan in accordance with its terms, its actions are not to be judged by fiduciary standards.

Musto, 861 F.2d at 911-12 (emphasis added). Finally, the Ninth Circuit similarly differentiates the duties owed in amending a plan from those arising from plan administration. Reflecting this approach, the Ninth Circuit held in *Amalgamated Clothing & Textile Workers v. Murdock*, 861 F.2d 1406, 1419 (9th Cir. 1988), that amending a benefit plan so that a corporate sponsor would receive any surplus funds not needed to pay participants did not by itself comprise an ERISA violation, but only constituted "a claim upon which relief may be granted in the context of the complaint's further allegations that the *fiduciaries* misused plan assets." *Id.* (emphasis added). In sum, the circuit courts have uniformly established that, as employer, a corporate sponsor is obligated to act in the best interests of its shareholders when amending a benefit plan; whereas, in their role as plan administrator with concomitant fiduciary duties, the same corporate sponsor must act in the sole interest of plan participants and beneficiaries when administering plan provisions.

Here, Defendant was not acting in its role as a plan administrator when it amended the Plan. Rather, amending the Plan to provide enhanced retirement benefits constituted a business judgment that properly resided with corporate officers. Therefore, Defendant's actions can not comprise a breach of the fiduciary duty

owed to the Plan participants because no such fiduciary duty existed. Indeed, the sole fiduciary duty implicated by the amendment was the duty owed to Defendant's stockholders. The Court views the subsequent payment of enhanced benefits to selected participants as merely Defendant's adherence, in its role as Plan administrator, to the terms of the lawfully amended Plan. As such, Plaintiff fails to allege facts to state a breach of fiduciary duty under ERISA independent of the amendment's substantive provisions. Further, Plaintiff mistakenly relies on 29 U.S.C. § 1344(d)(1) to argue that only through the process of plan termination does an exception arise to the general principle that benefits must never, more than incidentally, inure to an employer as a party-in-interest. The process of plan termination allows this exception under the *fiduciary* responsibilities arising from plan administration. Hence, Plaintiff's argument is inapposite because the violations alleged arise from the amendment of the Plan and not from the subsequent administration of its terms.

Plaintiff's attempts to distinguish the cases cited above fall far short of the mark.[3] The factual distinctions relied upon are not significant in the cases themselves and are nonexistent in the relevant statutes. In short, Plaintiff offers no authority to support his argument that the distinctions culled are of legal significance.

Plaintiff also asserts that Defendant specifically violated its fiduciary duty in requiring those participants electing to receive enhanced retirement benefits to execute a release of employment related claims. The Court disagrees and finds that this release condition, as embodied in the Plan amendment, was a design feature not subject to the scrutiny of ERISA's fiduciary standards

---

[3] [Footnote 2 omitted in original.] Plaintiff urges that the cases are distinguishable because, *inter alia*, they involve welfare rather than pension plans, unfunded or underfunded plans, amendments to terminate a plan, the initial creation and design of a plan, and/or amendments that only benefit the sponsor in an incidental manner.

unless improperly administered. This very type of release provision has been upheld in a case involving an initial plan creation, *Harlan v. Sohio Petroleum Co.*, 677 F. Supp. 1021, 1025 (N.D. Cal. 1988), and the Court finds no holding, statute, or compelling reason to prohibit its inclusion through the amendment of a continuing plan.[4]

Finally, Plaintiff contends that the doctrine of collateral estoppel precludes Defendant from contesting Plaintiff's fiduciary breach theory in relation to the Plan amendments. Plaintiff alleges that Defendants had a full and fair opportunity to litigate these same Plan amendment issues in a previous motion to dismiss in a similar cause of action. *Engineers and Scientists Guild v. Lockheed Corp.*, No. CV 90-6891 ER (GHKx) (C.D. Cal. 1990). The Court rejects this claim because the mere refusal by the prior court to grant the motion to dismiss did not adversely resolve any factual issues against Defendant, nor did it constitute a sufficiently firm or sufficiently final judgment. *Robi v. Five Platters, Inc.*, 838 F.2d 318, 326 (9th Cir. 1988).

C. Alleged Violations Through Oral Misrepresentation

Plaintiff argues in his final claim that despite the express language of the Plan, he is entitled to additional benefits on account of Defendant's alleged oral misrepresentation of coverage.[5]

---

[4] Plaintiff concedes that Defendant would have enjoyed broad discretion in both the establishment and termination of the Plan. The amending of a continuing plan seems similarly legitimate to the Court. Not surprisingly, the case law bears out this intuition. "The case law . . . makes it clear that when an employer decides to establish, *amend*, or terminate a benefits plan, . . . its actions are not to be judged by fiduciary standards." *Musto*, 861 F.2d at 912 (emphasis added).

[5] Although the basis for this claim is unclear, regardless of whether Plaintiff intended to bring this allegation under ERISA or state common law, ERISA explicitly preempts state laws to the extent that they relate to any employee benefit (continued...)

Defendant responds that ERISA only permits payment of benefits under the written terms of the Plan and no other section of ERISA authorizes recovery on a promissory or equitable estoppel basis.

Plaintiff accurately observes that 29 U.S.C. § 1132(a)(1)(B) allows a participant or beneficiary to bring suit against a plan "to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." However, the Ninth Circuit has held that recovery must be based upon the terms of the plan and that alleged oral misrepresentations are insufficient under 29 U.S.C. § 1132(a)(1)(B). Basing its analysis on 29 U.S.C. § 1102(a)(1), which requires benefit plans to be maintained pursuant to a written agreement, the Ninth Circuit rejected a suit for additional plan benefits holding that to allow a claim based on estoppel would conflict with the statutory requirement. *Davidian v. So. Calif. Meat Cutters Union & Food Employees Benefit Fund*, 859 F.2d 134, 136 (9th Cir. 1988); *see also Hansen v. Western Greyhound Retirement Plan*, 859 F.2d 779, 781 (9th Cir. 1988). In addition, there is no jurisdictional basis in this case for a claim under § 1132(a)(1)(B) because Plaintiff is not suing the Plan.

Second, although 29 U.S.C. § 1132(a)(2) permits a claim for equitable relief founded on a violation of fiduciary duty, the Supreme Court held in *Massachusetts Mutual Life Insurance Co. v. Russell*, 477 U.S. 134, 142, 105 S. Ct. 3085, 3090, 87 L. Ed. 2d 96 (1985), that any amounts recovered under § 1132(a)(2) must

---

[5] (...continued)
plan not exempt from federal regulation. 29 U.S.C. §§ 1144. Further, cases in the Ninth Circuit have consistently held that ERISA preempts state law theories of recovery. *E.g. Olson v. General Dynamics Corp.*, 960 F.2d 1418, 1423 (9th Cir. 1991) (holding that ERISA preempts a state law claim based on alleged oral misrepresentation by an employer as to the level of benefits). Therefore, only three statutory grounds, discussed *infra*, survive as conceivable foundations for recovery: 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(2), and 1132(a)(3).

be paid to a plan, not to an individual participant or beneficiary. In this action, recovery under § 1132(a)(2) is untenable because Plaintiff's oral misrepresentation claim is brought solely in his individual capacity, not on behalf of the Plan.

Finally, while 29 U.S.C. § 1132(a)(3) permits an action for equitable relief to enforce the terms of a plan, the Ninth Circuit has held that a suit for fiduciary breach may only be brought if recovery would inure to the benefit of the plan as a whole and not to individual participants. *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1418 (9th Cir. 1991). Again, Plaintiff brings his oral misrepresentation claim in his individual capacity and, thus, § 1132(a)(3) does not apply.

III. CONCLUSION

For all of the foregoing reasons, the Court GRANTS Defendants' Motion to Dismiss in its entirety, and DISMISSES Plaintiff's Complaint WITH PREJUDICE for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

IT IS SO ORDERED.

DATED: July 31, 1992

STEPHEN V. WILSON

UNITED STATES DISTRICT JUDGE

Theresa M. Traber
Bert Voorhees
LAW OFFICE OF TRABER & VOORHEES
128 N. Fair Oaks Avenue, Suite 204
Pasadena, California 91103
Telephone: (818) 585-9611

Attorneys for Plaintiff
Paul L. Spink

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. SPINK, individually and on behalf of a class of similarly-situated individuals, Plaintiff, vs. LOCKHEED CORPORATION, a Delaware corporation; DANIEL M. TELLEP; ROBERT A. FURMAN; VINCENT N. MARAFINO; K. H. ANDERSON; L. J. BARNARD; R. W. BERRY; P. N. BRAUNAGEL; D. L. BRONCO; R. H. NORTHCUTT; W. E. SKOWRONSKI; A. G. VAN SHAICK; and W. T. VINCENT, Defendants.	No.: 92-0800 SVW (GHKX) NOTICE OF APPEAL [Fed. Rule App. Proc. 3, 4; Local Rule 17]

Notice is hereby given that plaintiff Paul L. Spink hereby appeals to the United States Court of Appeals for the Ninth Circuit from this court's Order Granting Defendant Lockheed Corporation's Motion to Dismiss, entered July 31, 1992, and any Judgment which has been or will be entered thereon.

Pursuant of Local Rule 17.1 of the Local Rules of Practice for the United States District Court, Central District of California, plaintiff Paul L. Spink provides the following information regarding the parties and their attorneys:

Parties to the judgment and order appealed from:	Plaintiff PAUL L. SPINK, a class individually and on behalf of similarly-situated individuals; and defendants LOCKHEED CORPORATION, DANIEL M. TELLEP; ROBERT A. FURMAN; VINCENT N. MARAFINO; K. H. ANDERSON; L. J. BARNARD; R. W. BERRY; P. N. BRAUNAGEL; D. L. BRONCO; R. H. NORTHCUTT; W. E. SKOWRONSKI; A. G. VAN SHAICK; and W. T. VINCENT
Plaintiffs' Attorney:	Theresa M. Traber Bert Voorhees Traber & Voorhees 128 N. Fair Oaks Avenue Suite 204 Pasadena, CA 91103

Defendants' Attorney:	Gordon E. Krischer David E. Gordon Paul Borden O'Melveny & Myers 400 South Hope Street Los Angeles, CA 90071-2899

DATED: August 26, 1992

Respectfully Submitted,

TRABER & VOORHEES

By/s/ Theresa M. Traber
Theresa M. Traber
Attorneys for Plaintiffs
Paul L. Spink, et al.

[Declaration of Service omitted in printing.]

FOR PUBLICATION
No. 92-56094

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL L. SPINK,

Plaintiff-Appellant,

v.

LOCKHEED CORPORATION; DANIEL M. TELLEP; ROBERT A. FURMAN; VINCENT N. MARAFINO; K.H. ANDERSON; L. BERNARD; R.W. BERRY; P.N. BRAUN-AGEL; D.L. BRONCO; R.H. NORTHCUTT; W.E. SKOWRONSKI; A.G. VAN SHAICK; W.T. VINCENT,

Defendants-Appellees.

Argued and Submitted
February 1, 1994 -- Pasadena, California

Filed July 18, 1995

Before: Dorothy W. Nelson, Stephen Reinhardt, and Melvin Brunetti, Circuit Judges

Opinion by Judge Brunetti

COUNSEL

Theresa M. Traber, Bert Voorhees, Traber & Voorhees, Pasadena, California, for the plaintiff-appellant.

Gordon E. Krischer, David E. Gordon, Paul Borden, O'Melveny & Myers, Los Angeles, California, for the defendants-appellees.

OPINION

BRUNETTI, Circuit Judge:

Paul Spink filed a complaint on behalf of himself and similarly situated individuals against Lockheed Corporation and certain individual defendants (collectively "Lockheed"). Spink alleged that Lockheed's retirement plan violated the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 631 *et seq.*, as amended by the Omnibus Budget Reconciliation Act of 1986 (OBRA 1986), Pub. L. No. 99-509, 100 Stat. 1874 (1986). The complaint also included individual claims based on ERISA and the federal common-law doctrine of equitable estoppel. The district court dismissed the complaint pursuant to Fed. R. Civ. P. 12(b)(6). Spink appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part and reverse in part.

I. FACTS AND PROCEEDINGS BELOW

Because we are reviewing a dismissal of Spink's complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), we accept as true all the following material allegations of the complaint. *See Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 472 (9th Cir. 1994).

Spink worked for various subsidiaries and divisions of the Lockheed Corporation between 1939 and 1950. In May 1979, Spink again began working for Lockheed at the age of 61. At the time he was rehired, the terms of the Lockheed Corporation Retirement Plan for Certain Salaried Employees (Plan) lawfully excluded Spink from participating because he was over sixty years old. The Plan is a noncontributory defined benefit plan that covers substantially all salaried employees at Lockheed and certain subsidiaries.

Prior to rejoining Lockheed in 1979, Spink worked for Hughes Helicopters, where he expected to receive pension benefits if he continued to work through October 31, 1982. In an effort to recruit Spink from Hughes, Lockheed represented that if he accepted its offer of employment, Spink would participate in the Plan and would accrue credited service toward retirement benefits under the Plan during his subsequent employment with Lockheed. Lockheed personnel provided him with documents describing the benefits to which he would be entitled, and for the next four years sent him written year-end statements from the Plan notifying him of the amount of credited service he had accumulated as a Plan participant.

Lockheed notified Spink sometime in 1984 that he was not eligible to participate in the Plan because he was over sixty when hired.

In 1986, Congress passed OBRA 1986. OBRA 1986 amended ERISA, the ADEA, and the Internal Revenue Code (IRC), 26 U.S.C. §§ 1 *et seq.*, to bar age-based discrimination in participation and benefit accrual standards applied by employee benefit plans.

As a consequence of these amendments, for plan years beginning after January 1, 1988, the effective date of the amendments, Lockheed was required to allow employees hired after age sixty to participate in the Plan. Spink became a participant on December 25, 1988 (the first day of the Plan's 1988 plan year). In 1989, Lockheed informed him that it did not intend to credit him with accrued benefits based on his years of service with Lockheed prior to December 25, 1988. The Plan specifies that an employee who was previously excluded from the Plan would "not receive Credited Service for his pre-Member service []" under the terms of the Plan. Plan § 2.01(C).

On May 8, 1990, Lockheed amended the Plan, establishing a "1990 Special Retirement Opportunity" (SRO) and a "1990 Voluntary Retirement Program" (VRP), which were available to certain employees until June 30, 1990 (collectively the "1990 Plan amendments"). These programs offered increased retirement benefits to eligible employees as an incentive to terminate their employment. The increased benefits were paid out of the Plan's surplus assets. To partake in the increased pension benefits, Lockheed required employees to release virtually all potential employment-related claims they might have against Lockheed. Although he was eligible for the SRO option, Spink did not elect it because he did not wish to waive any ADEA and ERISA claims he may have against Lockheed. Spink retired in June 1990.

On February 5, 1992, Spink filed a five-count complaint against Lockheed. He brought all counts in his individual capacity, and also designated Counts I through III as a class action on behalf of all similarly situated employees. Counts I and II allege that the OBRA 1986 amendments to ERISA and ADEA entitle Spink and similarly situated employees to benefits under the Plan calculated on the basis of periods worked both before and after the effective date of the statute. Count III alleges that the 1990 Plan amendments constituted a breach of fiduciary duty and a prohibited transaction under ERISA. Count V alleges that because Spink relied on representations made by Lockheed, Lockheed is estopped from denying him benefits based on all of his employment since his rehire in 1979. Spink withdrew Count IV.

Lockheed moved to dismiss the complaint under Fed. R. Civ. Proc. 12(b)(6) for failure to state a claim upon which relief can be granted, and the district court granted Lockheed's motion and dismissed the complaint with prejudice. Spink timely appeals.

II. STANDARD OF REVIEW

We review de novo a grant of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *Carpenters Health & Welfare Trust Fund v. Tri Capital Corp.*, 25 F.3d 849, 852 (9th Cir.), *cert. denied*, 115 S. Ct. 580 (1994). In addition, "the interpretation of ERISA, a federal statute, is a question of law subject to de novo review." *Spain v. Aetna Life Ins. Co.*, 13 F.3d 310, 312 (9th Cir. 1993).

III. AGE DISCRIMINATION CLAIMS UNDER ERISA AND ADEA

We first consider whether the OBRA amendments to the ADEA and ERISA prohibit Lockheed from excluding Spink's and putative class members' pre-1988 years of service in calculating their accrued benefits. We conclude they do.

Prior to OBRA 1986, the ADEA and ERISA permitted an employer to deny participation in its pension plan to an employee who was over age sixty when hired if the plan's retirement age was sixty-five. *See* ERISA § 202(a)(2), 29 U.S.C. § 1052(a)(2) (1982 & Supp. V 1988); ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2) (1982 & Supp. V 1988). Congress enacted OBRA 1986 to change this situation.

The overall objective of the OBRA amendments was to "prohibit arbitrary age discrimination in employment." ERISA § 2, 29 U.S.C. § 621 (1988). To that end, § 9202 of OBRA 1986 amended ERISA by adding:

> [A] defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.

29 U.S.C. § 1054(b)(1)(H)(i) (1988). Similarly, OBRA § 9201 amended the ADEA by providing:

> [I]t shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits --
>
> > (A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, . . .

ADEA § 4(i)(1), 29 U.S.C. § 623(i)(1) (1988 & Supp. V 1993). With regard to the effective date of these sections, OBRA 1986 provides:

> The amendments made by sections 9201 and 9202 shall apply only with respect to plan years beginning on or after January 1, 1988, and only to employees who have 1 hour of service in any plan year to which such amendments apply.

Pub. L. No. 99-509, § 9204(a)(1); 100 Stat. 1979 (1986), *codified at* 29 U.S.C. § 623 note.

The parties agree that OBRA 1986 prohibits terminating or reducing the rate of benefit accrual because of the employee's age after January 1, 1988. They part ways over whether this prohibition requires that employers consider service years before the effective date of OBRA 1986 in calculating benefit accrual.

As with every question of statutory interpretation, we start with the language of the statute. The most natural reading of the text of OBRA 1986 §§ 9201 and 9202 compels us to conclude that pre-enactment service years must be included in benefit accrual calculation. OBRA prohibits age-based reduction in "the rate of

benefit accrual." Denying credited service years that an employee would have accumulated but for prior age-based exclusion from the Plan results in a reduced rate of benefits for that employee. Therefore, denying credited service years that an older employee would otherwise have accumulated is unlawful under OBRA.[1]

In the context of this case, the Plan provides that "eligibility for benefits under the Plan and the amount of a Member's benefit are determined on the basis of service." Plan § 4.01. An employee could participate in the Plan, and therefore accumulate credited service years, "upon being employed in a Covered Group" unless--prior to OBRA's effective date--the employee commenced employment when he or she was sixty years of age or older. Plan § 2.01(B) & (C). Because Spink began work

[1] Spink and Amicus, the American Association of Retired Persons, argue that including in benefit accrual any service years before OBRA 1986's effective date would not be a retroactive application of the amendments. Rather, they contend, this interpretation would merely apply the current law, prohibiting reduction of benefits based on age, to the operative formula. *See Puckett v. United Air Lines, Inc.*, 705 F. Supp. 422, 424 (N.D. Ill. 1989). We disagree.

To the extent our interpretation requires employers to include pre-enactment service years in calculating accrued benefits, it applies retroactively. Retroactivity depends on whether the new provision attaches new legal consequences to events completed before its enactment. *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1499 & n.3 (1994). "The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 1499. In light of the fact that OBRA 1986 prohibits a previously legal basis for discriminating in pension plans, and in consideration of the increase in pension obligations that will result from inclusion of pre-enactment service years, we acknowledge that OBRA 1986 operates retroactively *in this context*. However, this observation does not affect our conclusion because our analysis is based on retroactive intent of the statute manifested in its text. *See id.* at 1492; *see also* H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. 379 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4024 ("The conferees recognize that repeal of [law that permits age-based exclusion from plans] may have the effect of increasing an employer's minimum funding requirements significantly from employees hired within five years of normal retirement age.").

in a Covered Group after he had celebrated his sixtieth birthday, he did not become a Member of the Plan when he began work. Had he not been excluded because of his age, he would have begun to accumulate credited service years when he started working in a Covered Group and all those years would be used to calculate the amount of his benefits. Put another way, Spink's credited service was calculated as lower than that of a younger employee's because he was denied credit for all years of his employment in a Covered Group.[2]

Such an age-based reduction in the rate of accrual is the essence of OBRA's express prohibitions. The fact that the reduction would be accomplished indirectly, through reducing the number of credited service years, rather than directly by reducing the rate itself, is of no consequence.

Lockheed would have us focus on the cause of the disparity: the previously lawful exclusion of older employees from participation in the Plan. This argument raises the question of cause and effect. Since the cause of the disparity was lawful, Lockheed urges, the disparate result must therefore be lawful. However, OBRA 1986 does not speak to causes. Rather, by invalidating age-based reductions in the Plan's benefit accrual, OBRA 1986 forbids the discriminatory effects of the Plan. Lockheed cannot avoid the prohibition against age-based reductions in benefits by pointing to previously lawful causes of those reductions. *See* 29 U.S.C. § 1001(b); *Kayes v. Pacific Lumber*

[2] We acknowledge that our holding requiring that employees receive credit for years they were not Plan participants is contrary to Plan § 2.01(C). Section 2.01(C) of the Plan provides that "an Employee who was excluded from the Plan under Section 2.01 as in effect prior to December 25, 1988 shall become a Member on December 25, 1988 but shall not receive Credited Service for his pre-Member service." However, plan provisions are not controlling if they are inconsistent with the provisions of ERISA. *See* ERISA § 404(1)(D), 29 U.S.C. § 1104(1)(D) (1988 & Supp. V 1993).

Co., 51 F.3d 1449, 1468 (9th Cir. 1995) (remedial purpose of ERISA requires broad reading).

Congress explicitly excepted some nondiscriminatory causes from its prohibition against disparities in benefit accrual. For example, ERISA § 204(b)(1)(H)(ii), 29 U.S.C. § 1054(b)(1)(H)(ii) (1988), provides:

> A plan shall not be treated as failing to meet the requirements of this subparagraph because the plan imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

Under this provision, differences in accrual caused by a plan's service cap or early retirement provisions are permissible, even though they may result in disparities. *See Atkins v. Northwest Airlines, Inc.*, 967 F.2d 1197, 1200-01 (8th Cir. 1992). When Congress enumerates an exception or exceptions to a rule, we can infer that no other exceptions apply. *Koniag v. Koncor Forest Resource*, 39 F.3d 991, 998 (9th Cir. 1994); *Horner v. Andrzjewski*, 811 F.2d 571, 574-75 (Fed. Cir.), *cert. denied*, 484 U.S. 912 (1987); 2A Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 47.23 (5th Ed. 1992). Therefore, Congress' express exception of some nondiscriminatory causes of disparities in benefit accrual indicates that other discriminatory causes -- such as Lockheed's previously lawful exclusion of Spink from participation -- are not permissible.

Research into the legislative history also verifies our reading of the language of the OBRA 1986 amendments. An earlier version of OBRA 1986 adopted a Senate amendment that specifically provided that OBRA 1986 would apply only to individuals employed after December 31, 1988 and only to accrual

computation periods beginning after December 31, 1986. H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. 377 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4022, *and* 132 Cong. Rec. 25,044 (1986). Under this provision, pre-1986 employment was clearly excluded. However, Congress rejected this proposal in conference, *see* H.R. Rep. No. 99-1012, 99th Cong., 2d Sess. 378 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4023, and instead adopted a provision that would apply to all employees "who have one hour of service in any plan year to which the amendments apply." OBRA § 9204(a)(1). Congress knew the appropriate and specific language necessary to exclude pre-1988 service and chose not to include it. *See Arizona Elec. Power Co-op v. United States*, 816 F.2d 1366, 1375 (9th Cir. 1987). When Congress includes limiting language in an earlier version of a bill, but deletes it prior to enactment, we presume that the limitation was not intended. *See Russello v. United States*, 464 U.S. 16, 23-24 (1983).

Finally, we note that other provisions of OBRA 1986 demonstrate that Congress was well aware of how to limit application of the amendment to post-enactment service years. Section 9204(b) provides that "amendments made by section 9203 [amending 29 U.S.C. §§ 1002(24)(B) & 1052(a)(2) and 26 U.S.C. §§ 410(a)(2) & 411(a)(8)] shall apply only with respect to plan years beginning on or after January 1, 1988, and *only with respect to service performed on or after such date*." (Emphasis added). Since Congress chose not to include such a limitation in OBRA § 9204(a), the provision governing the effective date of §§ 9201 and 9202, we can infer that Congress did not intend that limitation to apply to those sections. *See Russello*, 464 U.S. at 23.

Lockheed contends that § 9204(b) compels the opposite result. To reach this conclusion, Lockheed points to the fact that § 9204(b) amends ERISA § 202, 29 U.S.C. § 1052, which contains minimum participation standards. Lockheed starts with the observation that ERISA §§ 204(b)(1) and (b)(4)(A) provide that

benefit accrual is based on years of participation. From there, Lockheed reasons that by limiting the retroactivity of participation requirements through § 9204(b), Congress indirectly limited the benefit accrual calculation to years after OBRA 1986's effective date. If § 9204(b) were the only statement about the effective date of OBRA 1986, Lockheed's reasoning might be persuasive. However, § 9204(b) is directly preceded by § 9204(a)(1), which explicitly pertains to the amendments made by the OBRA provisions at issue, §§ 9201 and 9202.

The first clauses of §§ 9204(a)(1) and 9204(b) are virtually identical. Both state that the amendments they govern shall apply "only with respect to plan years beginning on or after January 1, 1988, . . ." However, the latter portion of § 9204(b) includes the further limitation that the amendments made by § 9203 apply "only with respect to service performed on or after such date." By contrast, § 9204(a)(1) concludes that §§ 9201 and 9202 apply "only to employees who have 1 hour of service in any plan year to which such amendments apply." We cannot comprehend any logical reason why Congress would not include a limitation in the immediately preceding subsection, which would *directly* limit the application of benefit accrual standards, but instead include a temporal limitation in § 9204(b), thereby *indirectly* limiting the application of benefit accrual standards. *See Russello*, 464 U.S. at 23 (declining to find that differing language in two subsections has the same meaning).

All aspects of OBRA 1986's language, structure, and legislative history indicate Congress' intention that pre-enactment service years be included in calculating benefit accrual for older employees.[3] Lockheed withheld Spink's service years from 1979

[3] Both parties have implored us to apply the IRS's proposed regulations interpreting OBRA. Spink seeks to have us follow the reasoning of *Puckett*, 705 F. Supp. at 423, which relied on the IRS's proposed regulations to find that (continued...)

to December 25, 1988. Therefore, Spink has stated a claim for violation of OBRA 1986 upon which relief can be granted.[4]

IV. THE 1990 PLAN AMENDMENTS

Next we turn to Lockheed's amendment of the Plan to allow "purchases" of releases of potential claims. Spink contends that Lockheed violated ERISA when it adopted the 1990 Plan amendments, which required employees to execute a release of all potential claims before they could elect the SRO or VRP options and receive enhanced benefits. He contends that this arrangement involved the use of existing plan assets to benefit Lockheed and constituted a prohibited transaction with a party in interest, a *per*

[3] (...continued)
OBRA requires that pre-1988 service be included in benefit accrual. In reaching its decision, the *Puckett* court relied on the language in the regulations that states, "For a participant who has at least 1 hour of service for the plan sponsor in a plan year beginning in 1988 or thereafter, a defined benefit plan may not disregard any years of service, including years of service before 1988, because of age in determining the participant's plan benefit." Prop. Treas. Reg. 1.411(b)-2(f)(1)(ii), 26 C.F.R. Part 1, 53 Fed. Reg. 11876, 11884 (April 11, 1988).

Lockheed would instead have us rely on other language in the proposed regulations, "However, a defined benefit plan is not required under section 411(b)(1)(H) and paragraph (b) of this section to take into account for benefit accrual purposes any year of service completed before an employee becomes a participant in the plan . . . ", *id.*, and other provisions that suggest pre-1988 service should not be credited to employees in Spink's position. *See* 26 C.F.R. Part 1, 53 Fed. Reg. 11877.

We decline to apply either of these interpretations. Although the IRS has announced its intention to adopt final regulations that are essentially consistent with these proposed regulations, *see* I.R.S. Notice 88-126; 54 Fed. Reg. 604-01, it has not yet done so, and we need not accord deference to its proposed interpretations. *See Oakley v. City of Longmont*, 890 F.2d 1128, 1133 (10th Cir. 1989), *cert. denied*, 494 U.S. 1082 (1990).

[4] In Count V of his complaint, Spink claims that the doctrine of equitable estoppel bars Lockheed from denying credit for his post-1979 service. Because we conclude that OBRA 1986 requires employers to credit preenactment service, we need not address the equitable estoppel claim.

se violation of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D) (1988).[5] We agree.

ERISA provides, in pertinent part:

> A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan . . . .

ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D). "Party in interest" is defined in ERISA § 3(14)(C), 29 U.S.C. § 1002(14)(C) (1988), to include "an employer any of whose employees are covered by such plan."

Undeniably Lockheed is a party in interest under 29 U.S.C. § 1002(14)(C). It is equally indisputable that a party in interest who benefitted from an impermissible transaction can be held liable under ERISA. *See, e.g.*, ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988); *Nieto v. Ecker*, 845 F.2d 868, 873-74 (9th Cir. 1988) (stating that ERISA § 502(a)(3) gives plan participants the right to seek equitable relief against both the trustees who engaged in prohibited transaction and the party in interest who profited from it); *Kyle Rys. v. Pacific Admin. Servs.*, 990 F.2d 513, 516 (9th Cir. 1993) ("Under ERISA § 502(a)(3), 29

---

[5] Spink also argues in the alternative, both in his complaint and before this court, that Lockheed's 1990 Plan amendments constituted a breach of Lockheed's fiduciary duty, prohibited by ERISA § 404(a)(1)(A)(i), 29 U.S.C. § 1104(a)(1)(A)(i), and an unlawful inurement of plan assets barred by ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1). Because we hold that Spink's second cause of action states a viable claim for violation of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106, we leave for another day the issue of whether an employer acts as a fiduciary when it amends the plan in a way that affects plan assets. We also decline to address Spink's anti-inurement argument.

U.S.C. § 1132(a)(3), equitable relief for non-fiduciary liability is available only where a "party in interest" has participated in "prohibited transactions."). The only remaining question, then, is whether the 1990 Plan amendments were a transaction that directly or indirectly benefitted Lockheed.

Lockheed advances two arguments why we should answer this question in the negative. First, Lockheed suggests that by amending the Plan, it was merely imposing an eligibility requirement (signing a release of employment-related claims) on the SRP or VRP benefits. Employers have free rein under ERISA, Lockheed proclaims, to impose eligibility requirements and amend plans. Alternatively, Lockheed argues that the releases it obtained as a result of the 1990 Plan amendments were not a "benefit" to Lockheed in violation of ERISA. We address these arguments in turn.

Relying on *Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988), and *Harlan v. Sohio Petroleum Co.*, 677 F. Supp. 1021, 1026 (N.D. Cal. 1988), Lockheed claims that it has the unfettered right to amend the Plan and to establish eligibility requirements. Indeed, this court has held that "[employers] remain free to unilaterally *amend* or *eliminate* [severance] plans, without considering the employees' interests." *Joanou v. Coca-Cola Co.*, 26 F.3d 96, 98 (9th Cir. 1994) (emphasis supplied).

Lockheed misinterprets these statements, however, and overstates its freedom to amend. An employer's freedom to amend, while extensive, is not boundless. Lockheed is free to disregard employees' interests in amending the Plan, but it is not free to disregard the prohibitions of ERISA. "The substantive terms of . . . employee benefit plans must comply with the detailed and comprehensive standards of ERISA." *United Mine Workers of Am. Health and Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982).

ERISA prohibits use of plan assets by or for the benefit of sponsoring parties in interest. ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D). This prohibition would clearly forbid Lockheed from writing checks drawn on pension funds to buy the releases in question. Similarly, those provisions prohibit plan documents from providing for use of plan funds to buy the releases. In other words, Lockheed cannot avoid the prohibitions of ERISA by writing an amendment instead of a check. *See M & R Invs. Co. v. Fitzsimmons*, 685 F.2d 283, 287 (9th Cir. 1982) (holding that a plan amendment requiring the plan to lend money is a violation of ERISA § 406(a)(1)(B), 29 U.S.C. § 1006(a)(1)(B)); *Amalgamated Clothing and Textile Workers Union v. Murdock*, 861 F.2d 1406, 1419 (9th Cir. 1988) (finding plaintiff stated a viable claim by alleging that through amending and terminating plan, fiduciaries misused plan assets to further interests other than those of plan participants).

Lockheed's second argument is that the releases either were not a net benefit to Lockheed, or that they were merely an incidental benefit. Lockheed urges that the releases do not yield any net benefit to Lockheed because funds paid in exchange for the releases ultimately reduced the amount of surplus that will revert back to Lockheed upon termination of the Plan. Additionally, Lockheed reasons that the releases did not come free to Lockheed because it is ultimately responsible for any Plan shortfall.

Lockheed's astute examination of the economic realities of this situation ignores the central purpose of ERISA. The statute does not require employers to provide employee benefit plans; however, once an employer places assets in trust for the benefit of employees, it can no longer treat those assets as its own. "The crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators . . . ." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141 n.8 (1985). Indeed, Lockheed's reasoning proves too much: It would justify an

employer spending plan assets freely, without regard to any of ERISA's prohibitions. The logic of Lockheed's argument collapses under its own weight.

The releases at issue cannot be accurately characterized as an incidental benefit. Although no copy of the release appears in the record, the Plan describes the releases as waiving "any claims the Eligible Member may have against [Lockheed] arising from termination of employment or otherwise." Plan § 15.03(B)(4). The releases purport to be all-encompassing,[6] and assuming *arguendo* that such releases are valid despite their breadth, they relieved Lockheed of countless liabilities or potential liabilities to thousands of employees. This windfall can hardly be considered an incidental benefit. The fact that the amount of Lockheed's liability is not readily quantifiable does not render it incidental.

For these reasons, we conclude that the Lockheed's [sic] adoption of the 1990 Plan amendments violated ERISA because the amendments provided for use of Plan assets to purchase a significant benefit for Lockheed. Spink's second cause of action therefore states a viable claim.

V. COLLATERAL ESTOPPEL

Spink's next contention is that the district court erred when it declined to apply the doctrine of nonmutual offensive collateral estoppel to bar Lockheed from contesting the allegation that it breached its fiduciary duties under ERISA. He argues that Lockheed had a full and fair opportunity to litigate the same issue when it moved to dismiss a nearly identical claim pending before Judge Rafeedie, *see Engineers and Scientists Guild v. Lockheed Corp.*, No. CV 90-6891 ER (GHKx) (C.D. Cal. 1990)

---

[6] Spink did not raise, and therefore we do not address, the issue of whether Lockheed's waivers are impermissibly broad in their scope, or whether an employer can condition the receipt of benefits on a release of claims.

(unpublished order), and should be bound by the adverse ruling in that case.

Trial courts have broad discretion to determine when to apply offensive collateral estoppel. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979). The district court did not abuse its discretion by declining to do so here.

"Only a final judgment that is 'sufficiently firm' can be issue preclusive." *Robi v. Five Platters, Inc.*, 838 F.2d 318, 326 (9th Cir. 1988) (citing *Luben Indus. v. United States*, 707 F.2d 1037, 1040 (9th Cir. 1983)). To ascertain the "firmness" of a judgment, courts look to various factors, including whether the decision was tentative, whether the parties were fully heard, whether the court supported its decision with a reasoned opinion, and whether the decision was subject to appeal or was actually reviewed on appeal. *Luben*, 707 F.2d at 1040 (quoting Restatement (Second) of Judgments § 13 cmt. g (1982)). In *Luben*, we affirmed the district court's determination that an interlocutory order issued by another judge in the same district was not "sufficiently firm" because "it could not have been the subject of an appeal." *Id.*

Judge Rafeedie's denial of Lockheed's motion to dismiss in *Engineers and Scientists Guild* was not appealable and the parties subsequently settled the case. Under those circumstances, the district court did not abuse its discretion by refusing to apply issue preclusion to bar Lockheed from contesting Spink's fiduciary breach claim.

VI. ATTORNEYS' FEES

Finally, we consider Spink's request for attorneys' fees pursuant to ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1) (1988). This provision grants us discretion to determine whether to award

attorneys' fees and costs. 29 U.S.C. § 1132(g)(1). In exercising that discretion, we consider the following criteria:

> "(1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative legal merits of the parties' positions."

Watkins v. Westinghouse Hanford Co., 12 F.3d 1517, 1528-29 (9th Cir. 1993) (*as amended* Mar. 22, 1994) (quoting *Oster v. Barco of Cal. Employees' Retirement Plan*, 869 F.2d 1215, 1222 (9th Cir. 1988)). We read § 1132(g)(1) "broadly to mean that a plan participant or beneficiary, if he prevails in his suit under § 1132 to enforce his rights under the plan, should ordinarily recover attorneys' fees unless special circumstances would render such an award unjust." *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1468 (9th Cir. 1995) (internal quotations omitted).

Since most of the pertinent factors weigh in favor of Spink, we conclude that attorneys' fees are appropriate. With respect to Lockheed's culpability, as we indicated above, Lockheed's manipulation of plan assets was in direct contravention of the express provisions of ERISA. Spink's claims in Counts I, II, and III of his complaint posited significant legal questions designated as a class action brought on behalf of all similarly situated employees. Lockheed is well able to satisfy a fee award and our award of fees will deter other employers from manipulating plan assets through plan amendments. Although Lockheed prevailed on the collateral and equitable estoppel claims and its arguments on the age discrimination claim were tenable, its arguments regarding

the validity of the 1990 Plan amendments were meritless. Spink is entitled to attorneys' fees.

VII. CONCLUSION

For the foregoing reasons, the district court's dismissal of Counts I, II, and III of Spink's complaint is REVERSED; the district court's dismissal of Count V and the district court's denial of Spink's motion to collaterally estop Lockheed from contesting the allegation that it breached its fiduciary duty is AFFIRMED; Spink's request for attorneys' fees is GRANTED.

REVERSED in part; AFFIRMED in part.

NOT FOR PUBLICATION
No. 92-56094

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL L. SPINK,

Plaintiff-Appellant,

v.

LOCKHEED CORPORATION; DANIEL M. TELLEP; ROBERT A. FURMAN; VINCENT N. MARAFINO; K.H. ANDERSON; L. BERNARD; R.W. BERRY; P.N. BRAUN-AGEL; D.L. BRONCO; R.H. NORTHCUTT; W.E. SKOWRONSKI; A.G. VAN SHAICK; W.T. VINCENT,

Defendants-Appellees.

Filed September 1, 1995

Before: D.W. NELSON, REINHARDT, and BRUNETTI, Circuit Judge.

ORDER

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.